SUPREME COURT OF THE UNITED STATES.

No. 247.

THE SOUTHERN EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN F. DICKSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

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1 *Transcript from Circuit Court Chambers County.*

Be it remembered, that heretofore, to wit, at a circuit court begun and held for the county of Chambers, in the State of Alabama, in the town of Lafayette, on the 11th day of April, 1870, before his honor, Littlebury Strange, judge presiding, the following proceedings were had, to wit:

JOHN F. DICKSON, PLAINTIFF,
vs.
SOUTHERN EXPRESS COMPANY,
Defendant.
} The State of Alabama, in Circuit Court at Spring Term, A. D. 1868.

The plaintiff claims of the defendant five thousand dollars for the failure to deliver certain goods, to wit, fifty-two boxes of tobacco, received by said company as common carriers to be delivered to the plaintiff at Columbia, South Carolina, for a reward, which the said company failed to do.

W. H. BARNES,
Attorney for Plaintiff.

2 THE STATE OF ALABAMA, } In the circuit court of said
CHAMBERS COUNTY. } county.

To any sheriff of the State of Alabama.

You are hereby commanded to summon "The Southern Express Company" to be and appear at the next term of the circuit court to be held for said county, at the place of holding the same, on the first Monday in April, 1868, then and there to answer the complaint of John F. Dickson.

Witness my hand, on this 16th day of March, 1868.

SAMUEL SPENCE, *Clerk.*

THE STATE OF ALABAMA, }
CHAMBERS COUNTY. }

Personally appeared before me, Samuel Spence, clerk of the circuit court in and for said county, William H. Barnes, who, being first duly sworn, on oath says, that the president of the Southern Express Company, or other head thereof, secretary, cashier,
3 or managing agent is unknown, and that Richard W. Antry, at Cusseta, is a white person in the employ of said company and the agent of the same, and that process should be executed on him.

W. H. BARNES.

Sworn to and subscribed before me, this the 16th day of March, A. D. 1868.

SAMUEL SPENCE, *Clerk.*

Received in office the 16th day of March, 1868.

R. J. KELLAN, *Sheriff.*

Executed by serving copy of this writ on Richard Antry, who is the agent of the Southern Express Company at Cusseta, Alabama, this, the 25th day of March, 1868.

R. J. KELLAN, *Sheriff.*

SOUTHERN EXPRESS COMPANY
vs.
JOHN F. DICKSON, PLAINTIFF. } Circuit Court, October Term, 1868.

4 And now at this term of said circuit court comes the Southern Express Company by John M. Born, its chief agent, and superintendent for the State of Alabama, in this behalf duly authorized, and says that the said plaintiff, his action against this defendant ought not further to have and maintain, because it says that at the time of the bringing of this suit it was and is a corporation not incorporated by nor located in the State of Alabama, but was incorporated under the laws of the State of Georgia, and organized under its charter by virtue of said laws of Georgia, at the city of Augusta in said State of Georgia, where its president and general superintendent and chief office then was and now is located, and not in the State of Alabama; and said defendant avers that if any cause of action accrued to the said plaintiff the same accrued within the State of South Carolina and not in the State of
5 Alabama, and this the said defendant is ready to verify, wherefore it prays judgment whether the plaintiff should further have or maintain his aforesaid action against this defendant.

SOUTHERN EXPRESS COMPANY.

Comes John M. Born, and makes oath that the foregoing plea is true in substance and in fact, and that he is the duly authorized agent and superintendent of the said defendant in the State of Alabama.

JOHN M. BORN.

October 13th, 1868.

W. L. DORMAN, *Circuit Clerk.*

SOUTHERN EXPRESS COMPANY
vs.
JOHN F. DICKSON, PLFF. } Circuit Court, October Term, 1868.

Comes the defendant by John M. Born, its chief agent and superintendent, in this behalf duly qualified, and says, that at
6 the time of the suing out of this writ and at the time the same purports to have been served and executed on Richard Antry, the said defendant was a foreign corporation located in the city of Augusta in the State of Georgia, and organized and incorporated under the laws of said State of Georgia, and not under the laws of the State of Alabama, and at the time aforesaid the said defendant had but one general superintendent and agent of its business in the State of Alabama, and that superintendent and agent of

the said defendant was and is the said John M. Born, and that at the time aforesaid and when said writ was issued, and when the same was executed on Richard Antry, the said Born had his office in the city of Montgomery in the State of Alabama, and at the time last aforesaid the said Richard Antry was not the agent of said defendant in any other capacity than to receive freight
7 and money packages and letters to be forwarded by it from Cusseta in the county of Chambers in the State of Alabama, and to deliver such freight, money packages, and letters as should be sent by and through the agency of said Antry extended no further.

And the defendant avers that if said defendant is liable to be sued in the State of Alabama, the said writ should have been executed on the said John M. Born, who is the agent and superintendent of said defendant in the State of Alabama, in this behalf authorized to defend suits for it, and the said Antry has no such authority, and the said defendant further avers that the cause of action, if any such there be or ever was, did not accrue in the State of Alabama but accrued in the State of South Carolina, all which this defendant is ready to verify, whereupon he prays judgment that the service of said writ may be quashed.

SOUTHERN EXPRESS COMPANY.

8 Comes John M. Born, and makes oath that the foregoing plea is true in substance and in fact, and that the said Born is the agent and general superintendent for the defendant in and for the State of Alabama.

JOHN M. BORN.

Sworn to, October 13th, 1868.

W. L. DORMAN,
Circuit Clerk.

Filed 13th October, 1868.

W. L. DORMAN,
Clerk C. C.

JOHN F. DICKSON
vs.
SOUTHERN EXPRESS COMPANY. } Circuit Court Chambers County, Spring Term, 1869.

Be it remembered, that at the above term of said court, present presiding, the Hon. L. Strange, circuit judge, the defendant in the above cause moved the court, upon due notice to the plaintiff, for an order removing said cause to the next term of the Circuit
9 Court of the United States, held for the district in which Chambers county is located, and presented to the court the sworn petition of said defendant, setting forth the grounds of said application, which is hereto attached, marked "Exhibit A," and made part of this bill of exceptions, and also tendered a bond, as provided by the law in such cases, with good sureties, which is

hereto attached, marked "B," and which is made part of this bill of exceptions. This being all the proof in said motion, and the motion being argued by the counsel respectively for the parties, the court declined to grant said motion or to remove the cause, and defendant excepted to the ruling of the court, and this is signed and sealed in term time and ordered to be enrolled as a part of the record of said cause.

April 16th, 1869. LITTLEBERY STRANGE, [SEAL.]
Judge presiding Chambers Circuit Court.

10 "*A.*" "*Exhibit A.*"

THE STATE OF ALABAMA, } Circuit Court of Chambers County,
CHAMBERS COUNTY. } April Term, 1869.

To the honorable the judge presiding of said court:

The petition of the Southern Express Company, a corporation duly incorporated and organized under the laws of the State of Georgia, having its chief office in the city of Augusta, and extending its lines of transportation through the State of Alabama, and through a part of Chambers county at the time of the institution of the suit hereinafter named, to wit, on the 16th day ot March, 1868, respectfully represents that John F. Dickson was a citizen of the State of Alabama at the time aforesaid, did, on said 16th day of March, 1868, institute suit against your petitioner, claiming by said suit the sum of five thousand dollars, to which your petitioner has appeared, and the record of said suit is hereby referred to
11 and made part of this petition, and your petitioner states that it has reason to believe, and does believe, that from local influence said Southern Express Company will not be able to obtain justice in said state court.

Your petitioner now here moves for an order removing said cause to the Circuit Court of the United States for the State of Alabama, to be tried at the next term of said circuit court of the United States, and your petitioner offers to your honor William P. Chilton and John M. Born as its sureties, who are good and sufficient, that it will enter in said court, on or before the first day of its next session, copies of said process and proceedings against it. That no special bail, or bail of any kind, has been required in this cause.

CHILTON & THORINGTON,
Sol. for Defendant.
JOHN M. BORN,
Agent of Southern Express Company.

Sworn to and subscribed, this 6th of April, 1869.
W. L. DORMAN,
Clerk Circuit Court.

12 "*B.*" "*Exhibit B.*"

THE STATE OF ALABAMA, CHAMBERS COUNTY. } Circuit Court, April Term, 1869.

Know all men by these presents that we, the Southern Express Company and William P. Chilton and John M. Born are held and firmly bound unto John F. Dickson, in the penal sum of two hundred dollars, good and lawful money of the United States, for the payment whereof we bind ourselves, our heirs, personal representatives, and successors jointly and severally, firmly by these presents. Sealed with our seals and dated this sixth day of April, 1869. The condition of the above obligation is such that, whereas the said Southern Express Company has moved the Circuit Court of Chambers County aforesaid for an order removing for trial in the Circuit Court of the United States, to be held at Mobile, a cause pending in said Circuit Court of Chambers County, State of Alabama aforesaid, wherein the said John F. Dickson is plaintiff and the Southern Express Company, a corporation, is defendant; and whereas the said petitioner has obtained such order of removal upon petitioner entering into bond, and it appearing that no special bail, or other bail, was originally requisite or required in said cause. Now, if the said Southern Express Company shall enter in said Circuit Court of the United States, on the first day of its next session, copies of said process against it, and of all pleadings, depositions, testimony, and other proceedings in said cause, and shall also then and there enter special bail in said cause, if special bail was originally requisite therein, then this bond to be void, otherwise to remain in full force and effect.

13

J. M. BORN. [SEAL.]
W. P. CHILTON. [SEAL.]

Attest: G. W. GUNN.

14 Chambers Circuit Court, Fall Term, A. D. 1869.

Continued until mandamus in supreme court is decided.

Supreme Court of Alabama, January Term, A. D. 1870.

Mandate from Supreme Court.

To the Hon. L. Strange, or the judge of the Circuit Court presiding in and for Chambers County:

You are hereby notified that the following order and entry was made at the January term, 1870, of the Supreme Court of Alabama, to wit:

Ex-parte Southern Express Company.
First district. No. 47. Page 12.
Motion for mandamus.

Came the Southern Express Company, by attorney, and moves the court for a mandamus to compel the circuit court for Chambers

county to transfer and remove a certain cause and the trial thereof pending in said court, wherein John F. Dickson is plaintiff,
14 and the Southern Express Company is defendant, to the circuit court of the United States held in and for the State of Alabama, and the record and the matters therein appearing, together with the said motion on file, (M. D., page 86,) having been submitted at the last term and held under advisement until the present term, and fully examined and considered. It is ordered that a rule issue to the honorable the circuit court for Chambers county, commanding the said circuit court to remove and transfer said cause, and the trial thereof, to the circuit court of the United States in and for the State of Alabama, or that the presiding judge of said circuit court appear at the next term of this court, and on the first motion day of the division to which the county of Chambers belongs, and show cause why he hath not done so. It is further ordered that John F. Dickson pay the cost of this motion.

16 These are, therefore, to notify you, the said Littlebury Strange, or the judge of the circuit court presiding in and for the county of Chambers, in said state, that you are hereby commanded, in accordance with the order of our said supreme court, to cause an entry or an order to be made on the minutes of the court for said county, transferring and removing the cause of John F. Dickson, plaintiff, vs. The Southern Express Company, defendant, from the circuit court of said county of Chambers to the circuit court of the United States holden and for the State of Alabama, or that you appear at the next term of this court, on the first motion day of the division to which the county of Chambers belongs, and show cause why you have not done so, and herein you fail not.

In witness whereof, I have hereunto set my hand, this 4th day of March, 1870.

D. B. BOOTH, *Clerk.*

17 *Mandate from Supreme Court.*

The State of Alabama to the clerk of the Circuit Court of Chambers County, greeting, greeting:

Whereas, the record and proceedings of said court in a certain cause lately pending, wherein John F. Dickson was plaintiff and the Southern Express Company, defendant, wherein by said court at spring term, 1869, it was considered adversely to said defendant, as it is said, were brought before our supreme court by appeal taken pursuant to law on behalf of said Southern Express Company.

Now, it is hereby certified that it was considered by our supreme court, on the 7th day of February, 1870, that a rule issue to the honorable the circuit court of Chambers county, commanding said circuit court to remove and transfer said cause and the trial thereof

to the circuit court of the United States held in and for the State of Alabama, or that the presiding judge of said court appear at
18 the next term of this court on the first motion day of the division to which the county of Chambers belongs, and show cause why he hath not done so.

It is further ordered that John F. Dickson pay the costs accruing on said appeal in said supreme court and in the court below. Witness D. B. Booth, clerk of said supreme court, the 23rd day of Feb., 1870.

D. B. BOOTH, *Clerk.*

Order changing venue.

Chambers Circuit Court, Spring Term, A. D. 1870.

This day came the parties by their attorneys, and the attorney for the defendant produced in court an alternative mandamus commanding this court to transfer said cause for trial to the circuit court of the United States holden in and for the State of Alabama, or show cause, &c., which alternative mandamus was issued by the Supreme Court of the State of Alabama, and this court
19 having no cause to show other than what appeared in the petition for the transfer which was before the said supreme court, yields to the mandate of said supreme court, and hereby orders that said cause be, and the same is hereby, ordered to be removed and transferred to the circuit court of the United States at Mobile, Alabama, for trial, and that said cause, with copies of the proofs against said Southern Express Company, and of all pleadings, testimony, depositions, and other proceedings in said cause be transmitted by the clerk of this court and returned to the next term of said circuit court of the United States to be holden for the State of Alabama.

The costs of said transcript to be paid by the Southern Express Company, but to abide the final result of said cause.

Clerk's certificate.

THE STATE OF ALABAMA, }
CHAMBERS COUNTY. }

20 I, William L. Dorman, clerk of the circuit court of Chambers county, do hereby certify that the foregoing pages, from one to fourteen, inclusive, contain a true and correct transcript of all the original papers in the cause of John F. Dickson vs. The Southern Express Company, and that it contains a true copy of all the minutes, orders, and proceedings in said cause, and that I herewith send the original papers in this cause with this transcript.

Witness my hand and seal of office, this the 25th day of April, A. D. 1870.

W. L. DORMAN,
Circuit Clerk Chambers County.

Filing.

Filed May 2, 1870. N. W. TRIMBLE,
Clerk U. S. Circuit Court Southern District of Alabama.

* * * * *

Continuance.

WEDNESDAY MORNING, *January* 4, 1871.

Court met pursuant to adjournment. Present, Hon. William B. Woods, judge presiding.

JOHN F. DICKSON
vs.
THE SOUTHERN EXPRESS COMPANY. } No. 262.

On motion of plaintiff's attorneys, this cause is continued until the next term of this court.

* * * * *

Continuance.

WEDNESDAY MORNING, *April 26th*, 1871.

Court met pursuant to adjournment. Present, the honorable William B. Woods, judge presiding, and the honorable Richard Busteed, judge of the District Court of the United States for the State of Alabama.

JOHN F. DICKSON
vs.
SOUTHERN EXPRESS CO. } No. 262.

22 On motion of plaintiff's counsel, this cause is continued until the next term of this court.

* * * * *

23 *Continuance.*

WEDNESDAY MORNING, *January 17th*, 1872.

Court met pursuant to adjournment. Present, the honorable William B. Woods, judge presiding.

* * * * *

JOHN F. DICKSON
vs.
SOUTHERN EXPRESS COMPANY. }

This cause is continued by consent until the next term of this court.

* * * * *

Order publishing testimony and continuance.

WEDNESDAY MORNING, *April 10th*, A. D. 1872.

Court met pursuant to adjournment. Present, Hon. William B. Woods, judge, &c.

* * * * *

JOHN F. DICKSON
vs.
SOUTHERN EXPRESS COMPANY.

In this cause it is ordered that the testimony be published
24 and the cause be continued until the next term of the court.

* * * * *

Order publishing testimony.

MONDAY, *February 3d*, 1873.

Court met pursuant to adjournment. Present, the honorable Richard Busteed, sitting as circuit judge.

JOHN F. DICKSON
vs.
SOUTHERN EXPRESS COMPANY.

Ordered that the testimony be published.

TUESDAY MORNING, *February 4th*, A. D. 1873.

Court met pursuant to adjournment. Present, Hon. William B. Woods, judge, and honorable Richard Busteed, associate judge.

JOHN F. DICKSON
vs.
SOUTHERN EXPRESS COMPANY.

25 On motion of plaintiff's attorney, he is allowed to amend his declaration by adding a new count.

* * * * *

Additional complaint.

JOHN F. DICKSON, PLAINTIFF,
vs.
THE SOUTHERN EXPRESS COMPANY, DEFENDANT.

In Circuit Court of the United States for the Southern District of Alabama.

The plaintiff, for further count, filed, by leave of the court first had, claims of the defendant, which is a corporation, the further sum of five thousand dollars, in this: that the plaintiff heretofore, to wit, on the twenty-first day of March, 1864, left with the defendant, at Greensboro, North Carolina, fifty-two other boxes of tobacco, the property of plaintiff, of the value of five thousand dollars, to be by defendant safely kept until the same could be transported by defendant, as common carrier, to plaintiff, at West Point, in the State of Georgia,

for a reward to be paid defendant; and plaintiff says that in
26 consideration thereof defendant received said tobacco and undertook and promised to safely keep the same until defandant could transport the same as aforesaid, and then to carry and deliver the same as aforesaid. And plaintiff says that defendant could and ought to have kept and carried the same, as it undertook to do, but that it refused and neglected so to do, though plaintiff was ready and willing and offered to pay such reward; and afterwards, to wit, on the twentieth day of December, 1865, the plaintiff demanded said tobacco of defendant, and it refused to redeliver or pay therefor.

Whereupon plaintiff claims said value of said tobacco and interest from said demand.

And plaintiff, for further count, by like leave of the court filed, claims of defendant the farther sum of five thousand dollars, in this: that the defendant heretofore, to wit, on 21st March, 1864, left with defendant, at Greensboro, North Carolina, fifty-two other boxes of tobacco, the property of plaintiff, of the value of five thousand dollars, to be by defendant safely kept, for a reward
27 to be paid defendant, and returned to plaintiff on his demand. Yet plaintiff says that defendant, although it so received said tobacco and undertook, for reward as aforesaid, safely to keep and return the same as aforesaid, did not keep its said promises and undertakings, but refused to return the same to plaintiff, though said plaintiff afterwards, to wit, on 20th December, 1865, demanded the same, and was ready and willing to pay such reward, but defendant refused to deliver said tobacco and denied having the same. Wherefore plaintiff claims of defendant said value of said tobacco and interest from said demand.

R. H. & R. I. SMITH,
Plff's. Attys.

And the defendant denies the allegations in said additional counts contained.

WM. G. JONES,
Atty. for Deft.

Filed February 4th, 1873.
N. W. TRIMBLE, *Clerk.*

28 WEDNESDAY MORNING, *February 5th*, 1873.

Court met pursuant to adjournment. Present, Honorable William B. Woods, judge, and the Honorable Richard Busteed, judge of the district courts for the State of Alabama.

* * * * *

Order of court, &c.

JOHN F. DICKSON
vs.
THE SOUTHERN EXPRESS COMPANY.

This day comes the parties by their attorneys, and plaintiff moved to strike out the defendant's pleas in abatement found in the record

from the state court sent into this court, and it appearing from said record that after the filing of said pleas defendant appeared in said state court and had this cause removed into this court, it is considered that defendant has thereby waived said pleas, and that said motion be granted, and said pleas are stricken out, and defendant has leave to plead to the merits in said cause.

29 *Pleas.*

JOHN F. DICKSON, PLAINTIFF,
vs.
THE SOUTHERN EXPRESS COMPANY.
} Circuit Court of the United States Southern District of Alabama. Feb. 6th, 1873.

And now comes the defendant by attorney, and the pleas in abatement, heretofore pleaded by the defendant, having been stricken out by order of the court on the motion of the plaintiff. The defendant for answer to the original and amended bill of complaint pleads the general issue and denies the allegation in said complaint in short by consent.

February 6th, 1873. WM. G. JONES,
Atty. for Deft.

Filed February 6th, 1873.
N. W. TRIMBLE, *Clerk.*

THURSDAY MORNING, *February 6th*, 1873.

Court met pursuant to adjournment. Present, Hon. Wm. B. Woods, judge, and the Hon. Richard Busteed, judge of the district courts of the United States for the State of Alabama.

Continuance.

JOHN F. DICKSON
vs.
SOUTHERN EXPRESS COMPANY.

30 On motion of defendant's counsel, and for good cause shown, this cause is continued until the next term of this court, with leave to both parties to retake the depositions of witnesses already examined.

* * * * *
* * * * *
* * * * *

Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama. April Term, 1873.

At a regular term of the Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama, convened at the city of Mobile in the United States court room of the

custom-house, on the 14th day of April, (being the second Monday of said month,) A. D. 1873. Present, the Honorable William B. Woods, judge presiding.

* * * * *

Continuance.

JOHN F. DICKSON
vs.
SOUTHERN EXPRESS COMPANY.

On motion of defendant's counsel, this cause is continued until the next term of this court.

31 *Additional Count.*

In the Circuit Court of the United States for the Southern District of Alabama.

JOHN F. DICKSON, PLAINTIFF,
vs.
THE SOUTHERN EXPRESS COMPANY, DEFENDANT.

The plaintiff for further count, filed by leave of court first had, claims of the defendant, which is a corporation, the further sum of five thousand dollars, in this: that the plaintiff heretofore, to wit, on the 21st day of March, 1864, left with the defendant, at Greensboro, North Carolina, fifty-two boxes of tobacco, the property of the plaintiff, of the value of five thousand dollars, to be by the
32 defendant safely kept until the same could be safely transported by the defendant as common carriers, to Columbia, in the State of South Carolina, for a reward to be paid defendant, and there delivered to Trent and Rea for the plaintiff; and plaintiff says that in consideration thereof, defendant received said tobacco from the plaintiff and undertook with and promised him to safely keep the same until defendant could transport the same as aforesaid, and then to carry and deliver the same as aforesaid. And plaintiff says that defendant could and ought to have kept and carried and delivered the same as it undertook to do, but that it refused and neglected so to do, though the plaintiff was ready
33 and willing and offered to pay defendant such reward. And afterwards, to wit, on the 20th day of December, 1865, the plaintiff demanded said tobacco of defendants and it refused to deliver or pay therefor, whereupon plaintiff claims said value of said tobacco and interest from said demand.

SMITHS,
Attorneys for Plaintiff.

The defendant as to this count pleads the general issue, and denies the allegations therein in short, by consent with leave by con-

sent to give in evidence under the general issue any matters which would bar the action if specially pleaded.

WM. G. JONES,
Att'y for Defdt.

Consent given.

R. H. & R. I. SMITH,
For Pltff.

Filed January 16th, 1874.
N. W. TRIMBLE, *Clerk.*

34 Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama. December Term, 1873.

At a regular term of the Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama, convened at the city of Mobile in the United States court room of the custom-house, on the 22nd day of December, (being the fourth Monday of said month,) A. D. 1873. Present, the Hon. William B. Woods, judge presiding.

* * * * *

FRIDAY MORNING, *January 16th*, 1874.

Court met pursuant to adjournment. Present, the Hon. William B. Woods, judge presiding.

Judgment.

JOHN F. DICKSON
vs.
SOUTHERN EXPRESS COMPANY.

This day comes the plaintiff and defendant by their attorneys, and also comes a jury of good and lawful men, to wit, Wm. C. Gaynor and eleven others, who being duly elected, tried, and sworn well and truly to try the issues joined, upon their oaths do say: "We, the jury, find a verdict for the plaintiff, and assess the damages amounting to $6,611.98. W. C. Gaynor, Foreman. It is, therefore, considered by the court that the plaintiff, John F. Dickson, have and recover of the defendant, the Southern Express Company, the sum of six thousand six hundred and eleven and 98-100 dollars damages and the costs of this suit, for which let execution issue.

35 *Bill of Exceptions.*

Circuit Court of the United States, Southern District of Alabama.

JOHN F. DICKSON, PLAINTIFF,
vs.
THE SOUTHERN EXPRESS COMPANY, DEFENDANTS. } Dec'r Term, 1873.

Be it remembered, that on the trial of this case the plaintiff, to support the issues joined on his part, gave in evidence the receipt

of the defendant for fifty-two boxes of tobacco, dated at Greensboro, North Carolina, March 21st, 1864, which original receipt is attached to interrogatories filed in this case by the plaintiff to P. G. Trent, a witness for the plaintiff, whose deposition was taken on
36 said interrogatories and on cross-interrogatories, and was filed with the papers in this case and read in evidence to the jury, and a copy of which receipt, marked A, is hereto attached as part of this bill of exceptions.

The plaintiff further gave evidence tending to show that in the month of January 1864, he, the plaintiff, purchased from one Rea, in Chambers county, Alabama, where the plaintiff then resided, one hundred and fifty boxes of tobacco, all of which he, the plaintiff, afterward received, except the fifty-two boxes of tobacco which are the subject of this suit. That at the time of such purchase the said Rea and one P. G. Trent, both of whom resided in Chambers county, Alabama, were partners in the business of dealing
37 in tobacco, under the firm-name of Trent and Rea. That the tobacco so purchased was part of a larger lot of tobacco belonging to said Trent and Rea, and the fifty-two boxes of tobacco now in question were part of a larger quantity which said Trent and Rea had purchased to be delivered to them, and which was afterwards delivered to them at Greensboro, North Carolina, and such purchase of Rea's interest therein, by plaintiff, was made with the knowledge and consent of said P. G. Trent, and that afterwards, in the early part of March, 1864, in Chambers county, Alabama, the plaintiff employed and paid the said P. G. Trent to go on to
38 Greensboro, North Carolina, to divide the tobacco of Trent and Rea there, and set apart for the plaintiff fifty-two boxes of said tobacco, and to ship the same for the plaintiff by the Southern Express Company to West Point, Georgia, or if it could not then be so shipped, to be kept by defendant until it could be shipped, or if that could not be done, to store it there for the plaintiff, in an insurable warehouse, or if that could not be done, to sell the same and remit the proceeds to the paintiff. But that if the delivery could be made to the defendant, then said Trent's authority about and respecting the tobacco entirely ceased; and that the said P.
39 G. Trent did accordingly go on to Greensboro, and there, in March, 1865, divided the larger lot of tobacco belonging to Trent and Rea, and did then set apart the fifty-two boxes of tobacco, part of such larger quantity, for the plaintiff, and the whole of said larger lot of tobacco being then and previously in the express office of the defendant; that the said P. G. Trent then, to wit, on the 21st March, 1864, informed R. M. Sloan, the agent of the defendant there, of such division, and took from him the receipt for the said fifty-two boxes of tobacco, given in evidence in this case, and informed the said Sloan that said fifty-two boxes of tobacco belonged to the plaintiff, and that afterwards, in the spring of the year
40 1865, the said P. G. Trent gave to the plaintiff the said re-

ceipt, and that afterwards, in December, 1865, the plaintiff, at Greensboro, North Carolina, produced the same receipt to the said agent of the defendant, and demanded the said tobacco of said agent, who would not deliver the same to the plaintiff; and the plaintiff further gave evidence tending to show that the said tobacco was never delivered to him, or to any one for him, or by his order.

There was no evidence on either side tending to show that there was any delivery of the tobacco at Columbia, South Carolina, the place to which it was consigned. And the defendant gave
41 evidence to the jury tending to show that the plaintiff himself had never had personal possession of said fifty-two boxes of tobacco, nor ever saw the same, and that the same was in fact delivered to the defendant by said P. G. Trent, who was known to the said agent of the defendant, and the receipt for the same, in the form in which it now is, was then made and delivered to the said P. G. Trent, and that the said fifty-two boxes of tobacco were sold a few days after the giving of said receipt, by said P. G. Trent to one Cyrus P. Mendenhall, at Greensboro, North Carolina, and were then and there delivered to said Mendenhall by the said
42 agent of the defendant, by the order and direction of said P. G. Trent, and the freight for the transportation and carriage of said tobacco had not been paid or tendered to the defendant before such sale and delivery to said Mendenhall, but as to said matters there was conflicting evidence.

There was no evidence tending to show that the sale and delivery to Mendenhall was known to or assented to by plaintiff.

And the defendant, further to sustain the issues joined on its part, gave evidence tending to show that by the usage and custom in the express business, persons delivering packages to the express
43 company for carriage, are required to mark on such package the name of the person or persons to whom they are to be delivered, and of the place at which they are to be delivered, and the person or persons whose name is so marked is deemed the consignee of such package, and a receipt therefor is given to the shipper or consignor in the form of the receipt given in evidence in this case, and that the package is delivered to the consignee without requiring him to produce any receipt of the company therefor, the company taking a receipt of the consignee for the package when delivered.

And the plaintiff gave evidence in rebuttal tending to show
44 that if the package is returned to the shipper at the place of shipment, the usual custom is to require the shipper to produce and surrender the receipt given him therefor, but this is sometimes not required when the shipper is well known to the agent of the company, but in such case a counter receipt is taken for the goods.

There was no evidence that any counter-receipt was taken for the goods. There was conflicting evidence as to the alleged tender of

freight on said tobacco to the defendant, and as to the value of the tobacco, and as to the alleged sale and delivery of said tobacco to said Mendenhall.

The plaintiff insisted and contended that the said fifty-two
45 boxes of tobacco had not in fact been sold or delivered to said Mendenhall, and that if the same had been sold by the said P. G. Trent to said Mendenhall, and delivered to said Mendenhall by the defendant by said Trent's order or direction, at Greensboro, North Carolina, such sale and delivery did not affect the rights of the plaintiff in this case.

And the defendant insisted and contended that the said tobacco had been in fact sold by said Trent to said Mendenhall, and delivered to said Mendenhall by the defendant, by order and direction of said Trent, and that such sale and delivery discharged the defendant from liability to the plaintiff in this action.

46 And the court charged the jury that, if they believed from the evidence that the said tobacco was, at the time of its delivery to the defendant, the property of the plaintiff, and that was known to the defendant or its agent, though by the receipt given for it Trent and Rea were the consignees thereof, and the defendant might lawfully deliver the said tobacco to the consignees at Columbia, South Carolina, the defendant was not authorized to deliver the same to the consignees, or either of them, or to any other person by the order of either of them, at Greensboro, North Carolina, the place of shipment, and such delivery at Greens-
47 borough, North Carolina, without the knowledge or consent of the plaintiff, would not discharge the defendant from liability therefor to the plaintiff. To which charge of the court the defendant then and there excepted.

And the defendant then moved the court to charge the jury as follows, to wit:

1. That the legal effect of the receipt given by the defendant, dated March 21st, 1864, in evidence before the jury, taken in connection with the evidence as to usage, if such evidence is believed by the jury, was to make the tobacco therein mentioned deliverable to Trent and Rea, or their order; which charge the court refused to give as asked, but gave the same with the qualification and
48 addition of the words "at Columbia, South Carolina, but not at Greensboro, North Carolina." To which refusal to charge as asked, and which qualification of said charge, the defendant then and there severally excepted.

2. And the defendant further moved the court to charge the jury as follows, to wit:

That if the jury believe from the evidence that P. G. Trent, of the firm of Trent and Rea, was, at and before the time of the delivery of the tobacco in controversy to the defendant, in lawful possession of said tobacco as agent of the plaintiff or otherwise, and the defendant actually received the said tobacco from P. G.

49 Trent, or Trent and Rea, and gave for it the receipt in evidence before the jury, and the jury further believe from the evidence that the defendant afterwards redelivered the said tobacco to said P. G. Trent, or to any other person by his order and direction, in good faith, before any demand made therefor by the plaintiff, then such delivery was lawful and the plaintiff is not entitled, on account of such delivery, to recover the damages therefor from the defendant in this action;" which charge the court refused to give as asked, and to such refusal the defendant then and there excepted.

3. And the defendant further moved the court to charge
50 the jury as follows, to wit:

That the receipt by an express company or other common carrier of a package or packages marked with the name of a particular person or firm-name, and the name of a place within their line of transportation, imposes on the carrier the duty and gives him the authority to deliver the same to such person or firm, or to his or their order, and, if no other person be named as consignee, such a delivery is a discharge of the carrier's undertaking, if made to such person or firm, or to some other person by his or their order or direction, at the place where the same was first received;" which charge the court refused to give as asked, and
51 to such refusal the defendant then and there excepted.

4. And the defendant further moved the court to charge the jury as follows, to wit:

That if the jury believe from the evidence that before and at the time of the delivery of the tobacco in question to the defendant the said tobacco was in the possession of said P. G. Trent, as agent of the plaintiff, and he, the said Trent, delivered the said tobacco to the defendant, and took the receipt therefor given in evidence to the jury, and that the defendant afterwards, and before receiving any notice or information of the revocation of such agency, re-
52 delivered the said tobacco to said P. G. Trent, or to any other person by his order or direction, the defendant is not liable to the plaintiff in this action for any loss or damage arising from such redelivery of said tobacco to said P. G. Trent, or any other person by his order or direction;" which charge the court refused to give as asked, and to such refusal the defendant then and there excepted. And thereupon the defendant tenders this his bill of exceptions, and the same is allowed, signed, and sealed accordingly, this 23d day of January, 1874, during the same term of the court.

(Signed) W. B. WOODS, *Judge*. [SEAL.]

53 *Copy of receipt "A," referred to in the bill of exceptions.*

"SOUTHERN EXPRESS COMPANY,
GREENSBORO, N. C., *March* 21, 1864.

"Received of John F. Dickson, T. & R., fifty-two boxes, valued at each two hundred dollars, and for which amount the charges are

made by said company. Marked T. & R.—Trent & Rea, Columbia, S. C. War risk excepted. Which it is mutually agreed to be forwarded to our agency nearest or most convenient to destination, and there delivered to other parties to complete the transportation.

"It is further agreed, and is a part of the consideration of this contract, that the Southern Express Company is not to be
54 held liable or responsible for the property herein mentioned for any loss or damage arising from the dangers of railroad, ocean, steam, or river navigation, leakage, fire, or from any cause whatever, except the same be proved to have occurred through the fraud or gross negligence of its agents or servants, *unless specifically insured by it and so specified in this receipt*, which insurance shall constitute the limit of the liability of the Southern Express Company in any event; and if the value of the property above described is not stated by the shipper, at time of shipment, and specified in this receipt, the holder hereof will not demand of the Southern
55 Express Company a sum exceeding *fifty dollars* for the loss or destruction of or damage to each package herein receipted for. Nor shall said company be held responsible for the safety of said property after its arrival at the place of destination. ☞ All articles of *glass* or *liquids* will be taken at *shipper's risk only*, and the shipper agrees that the company shall not be held responsible for any injury or loss by breakage, leakage, or otherwise.

"For the company. R. M. SLOAN.

"Freight charges."

(On margin:) "Freight to be prepaid before shipment.

"Insured by Southern Express Company, war risks, seizure, or stoppage by civil or military authority or force excepted, for ——, to ——. $——. For the company."

Filed January 23rd, 1874.

N. W. TRIMBLE, *Clerk.*

56 *Application for writ of error.*

Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama.

JOHN F. DICKSON, PL'FF,
vs.
THE SOUTHERN EXPRESS COMPANY, DEF'T.

The defendant in the above-entitled case comes by attorney and claims and applies for a writ of error returnable to the next term of the Supreme Court of the United States, in due form, to review the judgment rendered in this case, and tenders bond with sufficient security thereupon according to law.

January 26th, 1874. WM. G. JONES,
Atty. for Def't.

Filed January 26th, 1874.

N. W. TRIMBLE, *Clerk.*

57 *Bond.*

Know all men by these presents:

That we, the Southern Express Company, by F. R. Osborne, its attorney in fact, as principal, and John C. Chamberlain and John Bowen, as sureties, are held and firmly bound unto John F. Dickson in the sum of thirteen thousand two hundred and twenty-five dollars, to be paid to the said John F. Dickson, his executors, administrators, and assigns. And to the payment thereof we bind ourselves jointly, severally, and firmly, by these presents. Sealed with our seals and dated the 26th day of January, 1874.

The condition of the above bond is this: Whereas, the said John F. Dickson, on the 16th day of January, 1874, recovered a final judgment in the Circuit Court of the United States for the Southern District of Alabama, in the fifth circuit, for the sum of six thousand six hundred and eleven $\frac{98}{100}$ dollars, besides costs, against the said Southern Express Company; and said Southern Express
58 Company have obtained a writ of error and filed in the clerk's office of said court a copy thereof, to reverse said judgment in said suit, and also a citation to the said John F. Dickson citing and admonishing him to be and appear before the Supreme Court of the United States to be holden in the City of Washington on the second Monday of October next, A. D. 1874.

Now, if the said Southern Express Company shall prosecute their writ of error to effect, or failing therein shall pay the judgment rendered in said circuit court and such judgment as may be rendered in said Supreme Court to which said writ of error is taken, and also such costs and damages as may be awarded against them, then the above and foregoing bond to be null and void, otherwise to remain in full force.

SOUTHERN EXPRESS COMPANY,
FRANK R. OSBORNE, *Attorney in fact.* [SEAL.]
JOHN C. CHAMBERLAIN. [SEAL.]
JOHN BOWEN. [SEAL.]

Taken and approved this 26th day of January, A. D. 1864.
59 (Signed) N. W. TRIMBLE,
Clerk U. S. Circuit Court Southern Dist. Alabama.

Filed January 26th, 1874.
N. W. TRIMBLE, *Clerk.*

60 In the Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama.

I, Nathaniel W. Trimble, clerk of the circuit court aforesaid, do hereby certify the foregoing pages, numbered from 1 to 60 inclusive, to be a full, true, and correct transcript of the record and proceedings in the case of Jno. F. Dickson against The Southern Express Company, had and determined in the said circuit court on the 16th

day of January, A. D. 1874, and appealed to the Supreme Court of the United States, as the same now remain on file and appear of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of said circuit court, this 24th day of August, A. D. 1874.

[SEAL.] N. W. TRIMBLE, *Clerk, &c.*

61 *Writ of error.*

UNITED STATES OF AMERICA.

The President of the United States to the judges of the Circuit court of the United States for the Southern District of Alabama, in the fifth judicial circuit, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between John F. Dickson and The Southern Express Company, a manifest error hath happened, to the great damage of the said Southern Express Company by their complaint appears:

We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, 1874, in the said Supreme Court then and there held, that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein, to correct that

62 error, what of right, and according to the laws and customs of the United States should be done.

Witness Honorable Nathan Clifford, acting as Chief Justice of the said Supreme Court, being next in precedence to the Chief Justice, the office of Chief Justice of our Supreme Court being now vacant, the 4th Monday of December, in the year of our Lord one thousand eight hundred and seventy-three.

N. W. TRIMBLE,
Clerk of the Circuit Court of the United States for the 5th judicial circuit and Southern District of Alabama.

(Endorsed:) Southern Express Co. vs. John F. Dickson. Writ of error. Filed January 26th, 1874. N. W. Trimble, clerk.

63 *Citation.*

UNITED STATES OF AMERICA, *ss.*

In the Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama.

To John F. Dickson, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the

second Monday of October next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Southern District of Alabama, "The Southern Express Company" is plaintiff and you are defendant in error, to show cause, if any
64 there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Sureme Court of the United States, this 15th day of August, in the year of our Lord one thousand eight hundred and seventy-four.

W. B. WOODS,
U. S. Circuit Judge.

Filed August 15th, 1874.
N. W. TRIMBLE, *Clerk.*

65 JOHN F. DICKSON
vs.
THE SOUTHERN EXPRESS COMPANY.

SOUTHERN DISTRICT OF ALABAMA, *ss.*

George Cottin, being duly sworn, saith that on the 22d day of August, 1874, he served on Robert Inge Smith, esq., attorney of record of the above-named appellee, John F. Dickson, a copy of the citation filed in this cause with the clerk of the Circuit Court of the United States in and for the Southern District of Alabama, by delivering said copy of the citation to the said Robert Inge Smith personally.

GEORGE COTTIN,
U. S. Deputy Marshal Southern Dist. of Ala.

Sworn to, this 24th day of August, 1874, before me.
N. W. TRIMBLE, *Clerk.*

(Endorsement on cover:) S. Alabama C. C. U. S. No. 247. The Southern Express Company, Plaintiff in Error, vs. John F. Dickson. Filed 2nd December, 1874.

United States Supreme Court.

THE SOUTHERN EXPRESS COMPANY,

Plaintiff in Error,

vs.

JOHN F. DICKSON.

BRIEF FOR PLAINTIFF IN ERROR.

CLARENCE A. SEWARD,
CHARLES M. DA COSTA,
Of Counsel.

NEW YORK:
Davis & Corson, Printers, 39 Nassau Street.
1877.

United States Supreme Court.

The Southern Express Company,

Plaintiff in Error,

vs.

John F. Dickson.

Brief for Plaintiff in Error.

CLARENCE A. SEWARD,
CHARLES M. DA COSTA,
Of Counsel.

NEW YORK:
Davis & Corson, Printers, 39 Nassau Street.
1877.

Supreme Court of the U. S.

IN ERROR TO THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA.

THE SOUTHERN EXPRESS COMPANY,
Plaintiff in Error.

vs.

JOHN F. DICKSON.

Statement of Case.

Dickson, the plaintiff below, sued the defendant in the Circuit Court for Chambers County, in the State of Alabama, at the Spring Term, in 1868, as follows:

"The plaintiff claims of the defendant five thousand dollars for the failure to deliver certain goods, to wit, fifty-two boxes of tobacco, received by said company as common carriers, *to be delivered to the plaintiff at Columbia, South Carolina*, for a reward, which the said company failed to do." (p. 1).

The Express Company was summoned to appear on the first Monday of April, 1868, and the writ was served on the 25th of March, 1868 (p. 2).

At the Spring Term of the Circuit Court, held in Chambers County, in 1869, the Express Company applied to remove the cause into the Circuit Court of the United States, upon the ground that it was a corporation created under the laws of the State of Georgia, and that it had reason to believe, and did

believe, that from local influence it would not be able to obtain justice in the said State Court.

Such motion was denied on the sixteenth of April, 1869 (p. 3, 4.)

The Express Company, thereupon, applied to the Supreme Court of the State of Alabama, at its January Term, 1870, for a mandamus, to compel the Circuit Court for Chambers County, to remove the said cause, and such proceedings were thereupon had, that at the Spring Term of the said Circuit Court, in 1870, the said cause was removed and transferred to the Circuit Court of the United States for trial (pp. 5, 6, 7.)

At the February Term of the United States Circuit Court held in 1873, the plaintiff was allowed to amend his complaint by adding thereto two new counts, as follows:

"That the plaintiff heretofore, to wit, on the *twenty-first day of March*, 1864, *left with the defendant, at Greensboro, North Carolina*, fifty-two other boxes of tobacco, the property of plaintiff, of the value of five thousand dollars, to be by defendant safely kept until the same could be transported by defendant, as common carrier, to plaintiff *at West Point, in the State of Georgia*, for a reward to be paid defendant; and plaintiff says that, in consideration thereof, defendant received said tobacco and undertook and promised to safely keep the same until defendant could transport the same as aforesaid, and then to carry and deliver the same as aforesaid. And plaintiff says that defendant could and ought to have kept *and carried* the same, as it undertook to do, but that it refused and neglected so to do, though plaintiff was ready and willing and offered to pay such reward; *and afterwards, to wit, on the twentieth day of December*, 1865, *the plaintiff demanded said tobacco of defendant, and it refused to re-deliver or pay therefor*" * *

"And plaintiff for a further count, by like leave of the Court filed, claims of defendant the further sum of five thousand dollars in this: that the defendant heretofore, to wit, *on 21st March*, 1864, *left with defendant, at Greensboro, North Carolina*, fifty-two other boxes of tobacco, the property of plain-

tiff, of the value of five thousand dollars, *to be by defendant safely kept for a reward to be paid defendant, and returned to plaintiff on his demand.* Yet plaintiff says that defendant, although it so received said tobacco, and undertook for reward as aforesaid, safely to keep and return the same as aforesaid, did not keep its said promises and undertakings, but refused to return the same to plaintiff, though said plaintiff afterwards, to wit, on 20th December, 1865, demanded the same, and was ready and willing to pay such reward, but defendant refused to deliver said tobacco, and denied having the same" (pp. 9, 10).

At the December Term of the United States Circuit Court, held in 1873, the plaintiff filed an additional count as follows:

"That the plaintiff heretofore, to wit, *on the 21st day of March*, 1864, *left with the defendant at Greensboro, North Carolina*, fifty-two boxes of tobacco the property of the plaintiff, of the value of five thousand dollars, to be by the defendant *safely kept until the same could be safely transported by the defendant as common carriers to Columbia in the State of South Carolina, for a reward to be paid defendant, and there delivered to Trent and Rea, for the plaintiff:* and plaintiff says, that in consideration thereof, defe- dant received said tobacco from the plaintiff and undertook with and promised him to safely keep the same until defendant could transport the same as aforesaid, and then to carry and deliver the same as aforesaid. And plaintiff says that defendant could and ought to have kept and carried and delivered the same as it undertook to do, but that it refused and neglected so to do, though the plaintiff was ready and willing and offered to pay defendant such reward. And afterwards, to wit, on the 20th day of December, 1865, the plaintiff demanded said tobacco of defendants and it refused to deliver or pay therefor." (p. 12.)

The defendant pleaded the general issue and denied.

"The allegations therein in short, by consent with leave by consent to give in evidence under the general issue any matters which would bar the action if specially pleaded."

These four causes of action, when analyzed, are as follows:

1st. For a failure to deliver the tobacco to the plaintiff at Columbia, South Carolina.

2nd. For a failure to safely keep the tobacco until the same could be transported to the plaintiff at West Point, in the State of Georgia.

3d. For a failure to safely keep the tobacco and return it to the plaintiff on demand.

4th. For a failure to transport the tobacco to Columbia, in the State of South Carolina, and there to deliver the same to Trent and Rea, for the plaintiff.

The Facts.

The evidence is not reported. The statement in the bill of exceptions is meagre, and the bill itself is apparently full of anachronisms. So far as it is intelligible, the facts appear to be these:

1. In January, 1864, Trent and Rea were partners in Chambers County, Alabama, and were there engaged in business as tobacco dealers, under the firm name of Trent & Rea (p. 14).

2. Trent & Rea had then purchased a large quantity of tobacco, and the same was afterwards delivered to them at Greensboro, North Carolina (p. 14).

3. After such delivery the tobacco was placed in the office of the Southern Express Company (p. 14). Where this office was, or when the tobacco was placed in it does not appear.

4th. In January, 1864, and before any of the tobacco had been delivered to Trent & Rea, the plaintiff purchased Rea's interest in the fifty-two boxes of tobacco which are the subject of this suit (p. 14.)

5th. "Such purchase of Rea's interest therein by plaintiff was made with the knowledge and consent of said P. G. Trent" (p. 14). This implies that the plaintiff purchased only Rea's interest as a member of the firm of Trent & Rea in the fifty-two boxes of tobacco, and negatives the idea that the *firm* of Trent & Rea were the vendors of the tobacco.

6th. In March, 1864, the plaintiff employed Trent "to go to Greensboro, North Carolina, to divide the tobacco of Trent & Rea there, and set apart for the plaintiff fifty boxes of said tobacco and

(1.) Ship the same for the plaintiff *by the Southern Express Company to West Point, Georgia;* or

(2.) If it could not be then so shipped, *to be kept by the defendant until it could be shipped;* or

(3.) If that could not be done, *to store* it there for the plaintiff *in an insurable warehouse;* or

(4.) If that could not be done, *to sell the same and remit the proceeds to the plaintiff*." (p. 14.)

"If the delivery could be made to the defendant" *i. e.*, for shipment to the plaintiff at West Point, "then Trent's authority about and respecting the tobacco entirely ceased."

7th. That the said Trent went to Greensboro, North Carolina, and there, in March, 1865, divided the larger lot of tobacco belong to Trent & Rea, and set apart the fifty-two boxes for the plaintiff.

8th. That Trent, on the 21st day of March, 1864, informed one Sloan, the agent of the Southern Express Company, at Greensboro, that said fifty-two boxes belonged to the plaintiff, and thereupon took from him the receipt given in evidence by the plaintiff, as the foundation of his case, which was in the words and figures following viz. : (pp. 14–17),

"SOUTHERN EXPRESS COMPANY,
GREENSBORO, N. C., March 21, 1864.

"Received of John F. Dickson, T. & R., fifty-two boxes, valued at each two hundred dollars, and for which amount the charges are made by said

company. Marked T. & R., Trent & Rea, Columbia, S. C. War risk excepted. Which it is mutually agreed to be forwarded to our agency nearest or most convenient to destination, and there delivered to other parties to complete the transportation. "It is further agreed, and is a part of the consideration of this contract, that the Southern Express Company is not to be held liable or responsible for the property herein mentioned, for any loss or damage arising from the dangers of railroad, ocean, steam, or river navigation, leakage, fire, or from any cause whatever, except the same be proved to have occurred through the fraud or gross negligence of its agents or servants, unless specifically insured by it, and so specified in this receipt, which insurance shall constitute the limit of the liability of the Southern Express Company in any event; and if the value of the property above described is not stated by the shipper, at the time of shipment and specified in this receipt, the holder hereof will not demand of the Southern Express Company a sum exceeding fifty dollars for the loss or destruction of, or damage to each package herein receipted for. Nor shall said company be held responsible for the safety of said property after its arrival at the place of destination. ☞ All articles of glass or liquids will be taken at shipper's risk only, and the shipper agrees that the company shall not be held responsible for any injury or loss by breakage, leakage or otherwise.

For the Company.

R. M. SLOAN.

Freight charges.

(On margin:) "*Freight to be prepaid before shipment.*

Insured by Southern Express Company, war risks, seizure or stoppage by civil or military authority or force excepted for ——

to—— $——

For the Company."

9th. In the Spring of 1865 Trent gave the receipt to the plaintiff, and in December, 1865 the plaintiff produced the same to the agent of the Express Company *at Greensboro*, and demanded the tobacco, which was not delivered to him; and the plaintiff thereupon gave evidence tending to show that the

said tobacco was never delivered to him or to any one for him, or by his order.

The Express Company proved:

1st. That the plaintiff never had personal possession of the tobacco.

2nd. That he never saw the same.

3d. That it was delivered to the Express Company by Trent, who was known to the company, and that the receipt was then made and delivered to and accepted by Trent.

4th. That Trent sold the tobacco at Greensboro, to one Mendenhall, to whom the same was then and there delivered by the Express Company by the order and direction of Trent.

5th. That the freight charges of the Express Company were neither paid nor tendered.

6th. That by the usage and custom of the Express business, persons delivering packages to the Express Company for carriage, are required to mark on such package the name of the person or persons to whom it is to be delivered, and the person or persons whose name or names are so marked thereon, is or are deemed the consignee or consignees of such package, and a receipt therefor is given to the shipper or consignor in the form of the receipt given in evidence in the case; and that packages are delivered to the consignees without requiring them to produce any receipt to the company therefor.

The case came on for trial on the 16th of January, 1874, and the jury found a verdict for the plaintiff, and assessed the damages at $6,611.98, and for such amount judgment was entered with costs.

Assignment of Errors.

I. The Court charged the jury that

"If they believed the evidence that the said tobacco was, at the time of its delivery to the Express Company, the property of the plaintiff, and that was known to the Express Company or its agent, *though by the receipt given for it, Trent and Rea*

were the consignees thereof, and the Express Company might lawfully deliver the said tobacco to the consignees at Columbia, South Carolina, the Express Company was *not* authorized *to deliver* the same *to the consignees* or either of them, *or to* any other person by *the order of either of them at Greensboro, North Carolina*, the place of shipment, and such delivery at Greensboro, North Carolina, without the knowledge or consent of the plaintiff, would not discharge the Express Company from liability therefor to the plaintiff."

To this charge there was an exception, and such exception constitutes the first assignment of errors.

II. The Express Company requested the Court to charge

"That the *legal effect of the receipt* given by the Express Company, dated March 21, 1864, in evidence before the jury, taken in connection with the evidence as to usage, if such evidence is believed by the jury, *was to make the tobacco* therein mentioned *deliverable to Trent and Rea, or their order;* which charge *the Court refused* to give as asked, but *gave the same with the* qualification and *addition* of the words, "*at Columbia*, South Carolina, but *not* at Greensboro, North Carolina."

There was an exception to this refusal to charge, and to the qualification of the charge; and such exception constitutes the second assignment of errors.

III. The Express Company further requested the Court to charge:

"That if the jury believe, from the evidence, that P. G. *Trent*, of the firm of Trent & Rea, *was*, at and before the time of the delivery of the tobacco in controversy to the Express Company, *in lawful possession of said tobacco, as agent* of the plaintiff, *or otherwise*, and the Express Company actually received the said tobacco from P. G. Trent, or Trent & Rea, and gave for it the receipt in evidence before the jury, and the jury further, believe from the evidence, that the Express Company afterwards *re-delivered* the said tobacco *to* said P. G. *Trent*, or *to* any other person by *his order* and direction, in good faith, before any demand made therefor by the plaintiff, then such delivery was lawful and the plaintiff is not entitled, on account of such delivery,

to recover the damages therefor from the defendant in this action."

The Court refused so to charge. To such refusal an exception was duly taken, and the same constitutes the third assignment of errors.

IV. The Express Company further requested the Court to charge:

"That the *receipt* by an Express Company or other common carrier *of a package* or packages *marked with the name* of a *particular person* or firm name, *and* the *name of a place* within their line of transportation, *imposes* on the carrier *the duty*, and *gives* him the *authority* to *deliver* the same *to such person* or firm, or *to his* or their *order*, and if no other person be named as consignee, such a delivery is a discharge of the carriers undertaking, if made to such person or firm or to some other person by his or their order or direction *at the place* where the same was first received."

The Court refused so to charge. To such refusal an exception was duly taken, and the same constitutes the fourth assignment of errors.

V. The Express Company further requested the Court to charge:

"That if the jury believe, from the evidence, that before and at the time of the delivery of the tobacco in question to the Express Company, the said tobacco was in the possession of said P. G. Trent as agent of the plaintiff, and he, the said Trent, delivered the said tobacco to the Express Company and took the receipt therefor given in evidence to the jury, and that the Express Company afterwards, and before receiving any notice or information of the revocation of such agency, re-delivered the said tobacco to said P. G. Trent, or to any other person by his order or direction, the Express Company is not liable to the plaintiff in this action for any loss or damage arising from such re-delivery of said tobacco to said P. G. Trent or any other person by his order or direction."

The Court refused so to charge. To such refusal an exception was duly taken, and the same constitutes the fifth assignment of errors.

Point I.

The only evidence produced by the plaintiff which tended to establish any undertaking by the defendant, was the bill of lading or receipt.

Point II.

Such bill of lading did not support either the first (p. 1), second (p. 2), or third (p. 10) counts. It did not

(*a.*) Undertake "to deliver to the plaintiff at Columbia, South Carolina."

(*b.*) Or "to safely keep until the same could be transported by defendant to plaintiff at West Point, in the State of Georgia."

(*c.*) Or, "that the defendant (plaintiff?) left with the defendant at Greensboro, North Carolina, * * to be by defendant safely kept, and returned to plaintiff on his demand."

And therefore each of these three counts was without legal support.

Point III.

The bill of lading tended to support a portion of the fourth (p. 12) count only, which was:

"To be by the defendant safely kept, until the same could be safely transported by the defendant as common carriers to Columbia, in the State of South Carolina, for a reward to be paid defendant, and there delivered to Trent & Rea for the plaintiff."

The words "for the plaintiff" are not justified by the language of the bill of lading, for that contains

no language modifying the position or rights of Trent & Rea as unconditional consignees. Nor could such words be implied in the bill of lading, for they would make the carrier a guarantor for the fidelity of Trent & Rea, which it is not within the scope of a carrier's duty to become.

Point IV.

The plaintiff, having given the bill of lading in evidence as part of his principal case (p. 13), having proved (p. 14) its delivery to himself in the Spring of 1865, one year after its date, and having produced (p. 15) it to the defendant as his sole authority for his demand, is bound thereby, and cannot recover on any common law liability, which the receipt of the shipment might otherwise have created.

Mich. Co. v. *Hale*, 6 *Mich.*, 243.
Jefferson v. *Worland*, 50 *Ind.*, 339.
Latham v. *Rulley*, 1 *L. J. K. B.*, 225.
Austin v. *Manchester*, 15 *Jurist*, 670.
Davidson v. *Graham*, 2 *Ohio N. S.*, 131.
Ferguson v. *Coppeau*, 6 *Harr. & Johns.*, 394.
Stump v. *Hutchison*, 11 *Penn.*, 533.

Point V.

The bill of lading concluded the contract, and alone created, as well as defined, the liability and undertaking of the Express Company. Any antecedent agreement, contract, understanding or arrangement was merged therein, and extinguished thereby, and therefore evidence thereof was not only irrelevant, but incompetent and illegal.

Long v. *N. Y. C. R. R. Co.*, 50 *N. Y.*, 76.
White v. *Vankirk*, 25 *Barb.*, 16.
Niles v. *Culver*, 8 *Barb.*, 205.
Wolfe v. *Meyers*, 7 *Sandf.*, 7.
Argyle v. *M. R. R. Co.*, 9 *Iowa*, 487.

Point VI.

The undertaking of an Express Company has been judicially defined: "The contract of an Express Company is that they will carry the packages or goods entrusted to them, and deliver them to the consignee at the proper time, and at the proper place, without loss or failure, except by act of God, or of the public enemy" (*Marshall* v. *Express Company*, 7 *Wis.*, 2).

Point VII.

Under this definition of its contract, whom could the Company lawfully regard as the consignee? The answer is obvious: "Trent & Rea." They are to be presumed to have been entitled to receive the goods; they are named as consignees; and they were intended to be the consignees.

1. As to the presumption.

The consignee is presumptively the owner of the property shipped (*Price* v. *Powell*, 3 *Comst.*, 222). *Prima facie*, the consignee is the owner (*Thompson* v. *Fargo*, 49 *N. Y.*, 188). The *prima facie* effect of a bill of lading, as regards the consignee, is to vest the ownership of the goods consigned by it in him (*The Sally Maggie*, 3 *Wall.*, 451).

A consignee of goods has a right to libel a vessel in his own name for their non-delivery, unless there is something to show that he had no interest in them, The presumption is that he had an interest. (*Lawrence* v. *Mintuen*, 17 *How*, 100.) The effect of a consignment of goods generally is to vest the property in the consignee (*Grove* v. *Brien*, 8 *How.*, 429). There is no difference in point of law between common carriers on land and common carriers on water (*King* v. *Shephard*, 3 *Story*, 349).

Informing the Express Company "that said fifty-two boxes of tobacco belonged to the plaintiff" (p. 14), without giving some other and further information or instruction, was without legal effect. The legal presumption is based upon the ordinary transactions of commerce, and in the vast majority of cases an unpaid vendor is the consignor, and a debtor vendee is the consignee. It is in just such cases as these that the law of stoppage in transitu arises and is applied, and the vendor's lien held to be superior to the vendee's right under the bill of lading, and to exonerate the carrier. There was nothing, therefore, in the information to rebut the presumption that Trent & Rea were the vendees, and entitled to demand delivery from the Express Company.

2. As to the designation in the bill of lading.

This is sufficiently explicit (p. 17). "Received ** fifty-two boxes marked T. & R.—Trent & Rea, Columbia, S. C., which it is mutually agreed to be forwarded ** ** and there delivered **." This constituted Trent & Rea the actual consignees, and confirmed the presumption and made the Express Company their agents, and constituted them the agents of Dickson, if he was the owner, to receive and sell the goods and account for their proceeds (*Bank of Rochester* v. *Jones*, 4 *Comst.*, 500). In *Scheets* v. *Wilgus* (56 *Barb.*, 662), the Court held that the person named in a shipping bill as the consignee is the regular and only consignee of the cargo, and, by the terms of such bill, the master of the vessel is bound to regard and treat him as such, and owes to him all the duties which the master can owe to the consignee in any case, *whether he owns the property or not.*

The language of the bill of lading must control. It makes Trent & Rea the absolute consignees. It does not upon its face suggest any limitation of their legal rights as such consignees. The exceptions show no such limitation in fact, and, therefore, the Express Company could rightfully regard

them as consignees, clothed with all the power that the term implies.

3. That Trent & Rea were intended to be the consignees in fact, is evident, not only from the bill of lading, but by the language of the count (p. 12)—"safely transported to Columbia, S. C., and there delivered to Trent & Rea * * * ." This intendment is further confirmed by the fact that Dickson adopts the bill of lading, claims under it, and uses it as the foundation for his recovery. If the original shipment was wrong, Dickson has ratified it by adopting the bill of lading, and he must take that *cum onere*. If it is evidence to conclude the Express Company, it is equally evidence to conclude the shipper.

The goods having been delivered to the intended consignees, or to their order, it is immaterial, so far as Dickson's rights are concerned, where such delivery was made. At all events, the evidence does not show that he was damnified by a premature delivery. It does not show that by the failure of Trent & Rea, a right to stop in transitu had arisen which Dickson, by the delivery at Greensboro, was prevented from exercising.

Point VIII.

If Trent & Rea were the consignees, what were their rights, and what were the duties of the Express Company?

The Court below charged the jury (p. 16), that "the said defendant might lawfully deliver the said tobacco to the consignees, and at Columbia, South Carolina." This admitted that Trent & Rea were the consignees; but the Court also said in substance that a delivery to Trent & Rea elsewhere, without the assent of Dickson, would not exonerate the Express Company. This point was passed upon by

the Court in its charge, or its refusals to charge, in three different forms, which are presented in the first, second and fourth exceptions.

If Trent & Rea were the consignees, they had a legal right to demand the delivery of the tobacco at any point, and it was the duty of the Express Company to deliver it when and where it was so demanded.

1. The insertion in a bill of lading of the domicil or place of business of the consignee is a fact without legal significance so far as the shipper is concerned, unless he has himself created such significance by positive instruction; in other words, has instructed the carrier not to deliver elsewhere, and has caused such instruction to be inserted in the bill of lading. Otherwise the carrier is ignorant, and otherwise the bill of lading would be controlled by parol. There was no such instruction in this case. The fact that Dickson owned the tobacco—if such were the fact—did not convey such instruction; and if it did, it could not control the bill of lading, which can alone be looked to in determining the legal rights of the parties.

2. The rights of a consignee are not terminal only. He may lawfully demand the goods wherever such demand can be reasonably made and complied with. This is involved and conceded in every discussion as to right to freight *pro rata itineris*, and the question discussed is not as to the right of the consignee to demand and receive the shipment, but as to his liability to pay freight for the entire voyage.

Hunt v. *Haskell*, 24 *Maine*, 339.
Marine Co. v. *United Co.*, 9 *Johns.*, 186.
Violet v. *Stettimus*, 5 *Cranch, C. C. R.*, 559.
Gray v. *Water*, 2 *Serg. & R.*, 229.
Brittain v. *Barnaby*, 21 *How.*, 527.

Even if the title does not pass by the bill of lading, and the right to stop exists, the latter may be defeated by a sale by the consignee before arrival (*Lee* v. *Kimball*, 45 *Maine*, 172), and he may do the same thing by demanding delivery, because in such case the carrier acts as bailee for the person

indicated in the bill of lading as the consignee, and must recognize his right. (*Wait* v. *Baker*, 2 *Exch.*, 1; *Moakes* v. *Nicholson*, 19 *C. B., N. S*, 290; *U. S.* v. *Delaware Ins. Co.*, 4 *Wash., C. C. R.*, 422.)

3. The law is too well settled to be now shaken, that the consignee may rightfully demand and receive the shipment at any reasonable place. The shipper also may make an intermediate reclamation before delivery or negotiation of the bill of lading (*Mitchell* v. *Ede*, 11 *Ad. & E.*, 888; *Blanchard* v. *Page*, 8 *Gray*, 285; *Cleveland* v. *Sargeant*, 19 *Ohio State*, 438; *The President* v. *Stubbs*, 6 *Mass.*, 422), and the carrier is thereby absolved.

So on the other hand, if the consignee takes possession of the goods before they have arrived at the ultimate place of delivery, the carrier's risks and liability are terminated (*Stone* v. *Waitt*, 31 *Maine* 409); for the delivery contemplated by the bill of lading, is a transfer into the possession and power of the consignees. (*Howland* v. *Greenway*, 22 *How.*, 492.)

In *Foster* v. *Frampton* (6 *B. and C.* 107), the Court said:

"Where a man orders goods to be delivered at a particular place, the transitus continues until their delivery to the consignee at that place. But that must be understood of a delivery in the ordinary course of business. For, if the consignee, before the goods reach their ultimate destination, postpones the delivery, or does any act which is equivalent to taking actual possession of them, the transitus is at an end."

In *Whitehead* v. *Anderson* (9 *M. & W.*, 518), the Court said:

"If the vendee takes the goods out of the possession of the carrier into his own before their arrival, with or without the consent of the carrier, there seems to be no doubt that the transit would be at an end, though, in the case of the absence of the carrier's consent, it may be a wrong to him for which he would have a right of action."

In *L. & N. W. R. R. Co., v. Bartlett* (7 *Hurlstone & N.*, 407,) the judgment of the Court was pronounced by POLLOCK, C. B.

"The judgment of the Court below was wrong, being founded on a notion that the carrier was bound to deliver the wheat at the mill, notwithstanding the distinct and positive order of the consignee not to deliver it there. It is clear that the consignee may receive the goods at any stage of the journey, although the consignor directs the carrier to deliver them at a particular place. There is no contract by the carrier to deliver at that place, and not elsewhere. The contract is to deliver there, unless the consignee shall require the goods to be delivered at any other place. Here, the wheat was delivered at the place where the consignee desired it to be delivered, and therefore the carrier is not liable."

BRAMWELL, B., said:

"It would probably create a smile anywhere but in a Court of law if it were said that a carrier could not deliver to the consignee at any place, except that specified by the consignor. The goods are intended to reach the consignee, and, provided he receives them, it is immaterial at what place they are delivered. The contract is to deliver the goods to the consignee at the place named by the consignor, unless the consignee directs them to be delivered at a different place. * * * * I cannot help thinking that the consignor is not worse off than he would have been if the contract had been strictly performed. He has neither more nor less than he would have had if the wheat had been delivered at his mill."

CHANNEL, B., said:

"The contract on the part of the carrier is not that the consignee shall accept, but that the carrier shall deliver."

WILDE, B., said:

"I think that a consignee may at any time dispense with the delivery which the consignor has contracted for with the carrier at a particular place, by receiving the goods, which are the subject of the contract, at some other place. I think the consignee has the power of ordering the goods to be

delivered to him at any place. Then it is said that, though he may have that power, if he exercises it before the goods arrive, that is different from exercising it afterwards. I confess I cannot see the distinction. Then it is said that the rights of the consignor are affected by the non-delivery of the wheat at the place where he directed it to be delivered. I don't think they are. If the consignee accepts the goods, his rights and liabilities as regards the owner are precisely the same whether he accepts them at his mill or at the station. I think that the consignor is under no such difficulty as that suggested, and even if he were, it would not affect the question whether the carrier's contract was performed."

In the case of *Withers* v. *Macon, etc., Co.* (35 *Georgia*, 273), corn was shipped from St. Louis to Macon. The consignee demanded possession of the corn at an intermediate point, viz., Atlanta. The Court said:

"The plaintiffs in error had a right to arrest the transportation of their corn at Atlanta as they sought to do, without being subjected to the payment of freight on it to Macon."

In *Dougherty* v. *B. A. W. R. R. Co.* (1 *N. Y., Sup. Ct., T. & C.*, 377), the Court said:

"The consignee may receive goods addressed to him at any place, either before or after their arrival at the place of destination, and such acceptance operates as a discharge of the carrier from his liability. As to the carrier, the consignee is owner, and to be treated, and his orders regarded as such."

Where goods are delivered by a vendor to a carrier to be carried to a certain place, with the added words, "For Messrs. ——— & Co.," these persons, thus appearing to be the consignees of the goods, may demand them of the carrier at any other place; and if, on such demand, and on receiving payment for the carriage, the carrier, who has not received from the vendor any special communication on the subject of the place of delivery, delivers them up to the consignee, the carrier will not be responsible to the vendor for any damages which

may arise to the vendor from such delivery. In this case the delivery note was addressed: "For Messrs. John Stein & Co., Limk. Station, Limerick." The receipt note was: "One puncheon of whiskey addressed to Seymour's Customs Warehouse at Limerick." The consignees received the goods at the station, and not at the customs warehouse—a half-mile distant—and so the plaintiff had to pay the duties. (*Cook D. Co.* v. *G. S. & W. R. R. Co.*, *Eng. Law Rep.*, 7 *E. & I. Appeals*, 269.)

The carrier's duty to deliver to the consignee, and the consignee's duty to receive, are reciprocal (*Adams Express Co.* v. *Darnell*, 31 *Ind.*, 20), and any delivery which discharges the carrier as between him and the consignee is good against the consignor (*Price* v. *Oswego R. R. Co.*, 58 *Barb.*, 606)

The real question is, for whom by the bill of lading were the goods *intended?* for, if they have reached such person, the delivery to him is good, and absolves the carrier, even though the delivery was obtained by fraud. (*Price* v. *Oswego Co.*, 58 *Barb.*, *S. C. R.* 599; *McKean* v. *McIvor*, *Eng. Law Rep.* 6, *Excheq.*, 36).

The count and the bill of lading both show that Dickson intended that the tobacco should be delivered to Trent & Rea, and it was delivered to them by being delivered by Trent's order to his vendee C. P. Mendenhall. Trent & Rea were bound by what Trent did; for partners are bound by what is done by one another in the course of the partnership business, and "Trent & Rea were partners in the business of dealing in tobacco" (p. 14.) (*Parsons on Partnership* 170 *and note*).

The Court, therefore, erred in its charge and in its refusals, as specified in the first, third and fourth exceptions, that the legal effect of the receipt was to make the tobacco deliverable to Trent & Rea or their order at Columbia, South Carolina, but not at Greensboro, North Carolina."

Point IX.

The fact that Trent & Rea did not surrender the bill of lading to the Express Company on receiving the goods is without legal significance.

1. The bill of lading was not negotiable. It was personal only, and did not run to order or assigns, and was, therefore, a chose in action, and not assignable at the common law. (*Henderson* v. *Compton*, *Eng. Law Rep.*, 5 *P. C.*, 253.) It was not necessary, therefore, that it should be re-delivered to the Express Company for its protection, for Trent & Rea could not by endorsement pass a legal title under it, and *a fortiori*, having received the goods, they could not convey an equitable title to them.

Point X.

The question whether the freight was or was not paid, was irrelevant, saving as bearing on the ownership of Dickson. He never paid or tendered it, and so did not fix his right, if he had any, under the terms of the bill of lading: "Freight to be prepaid before shipment."

Point XI.

Dickson was not the owner of the tobacco. Trent & Rea owned it, and, therefore, the Court erred under the third exception (*p.* 16) in its refusal to charge: "That, if P. G. Trent *of the firm* of Trent & Rea was *at* and before the time of the delivery of the tobacco to the Express Company *in lawful possession* of said tobacco as agent of Dickson *or otherwise*, then its delivery to him or to his order was lawful."

This refusal was error, for, if Dickson was not the owner, he had no cause of action against the carrier who had delivered the tobacco by the order of the true owner.

That Dickson was not the owner seems to be clear.

1. In January, 1864, when Dickson alleged that he purchased the tobacco, it was not in the possession of Trent & Rea. They had purchased it, but it had not been delivered to them. "Afterwards," *i. e.*, after January, 1864, the only preceding date, it "was delivered to them at Greensboro, when the said P. G. Trent did accordingly go to Greensboro, and there in March, 1865, divided the larger lot of tobacco, and did then set apart the fifty-two boxes for the plaintiff, the whole of said larger lot being then and previously in the Express office." On the assumption that this date is correct the transactions seems to have been this: Trent procured the receipt before the tobacco was delivered to his firm, and in anticipation of it. Then he declines to fulfil the sale to Dickson and sells to C. P. Mendenhall, but when he delivers to him does not appear. The exceptions state, "were sold in a few days after the giving of the receipt by Trent to Mendendall, and were then and there delivered to Mendenhall." If the dates are correct, Mendenhall was in the actual possession of the tobacco before Trent "set apart the fifty-two boxes for the plaintiff," and therefore, when Trent on the 21st of March, 1864, informed the agent of the Express Company "of such division," it had not in fact been made.

It results, therefore, and whether the dates are or are not correct, that Trent & Rea refused to fulfil the contract, to sell to Dickson, and that he never became the owner.

Further than this, the bill of exceptions shows that Trent, as partner, never sold his interest in the tobacco to Dickson. The express averment is (p. 14): "The plaintiff *purchased from one Rea.* At the time of such purchase Rea and one P. G. Trent were partners. The tobacco so purchased was part

of a larger lot belonging to Trent & Rea, *and such purchase of Rea's interest therein by plaintiff was made with the knowledge and consent of said P. G. Trent.*"

This is conclusive that Dickson never acquired Trent's interest in the tobacco. If he did acquire Rea's interest, he became by so doing a tenant in common with Trent, and Trent, therefore, had a right, as such half-owner, to control the whole, so far as the carrier was concerned, and Dickson's rights were limited to an accounting or in trover against Mendenhall. Tenants in common have an equal right of possession, and, if one sells, the co-tenant may maintain trover (*Hyde* v. *Stone*, 9 *Cow.*, 230). Trent, as a tenant in common, had a right to the possession of the whole, as well as of each part, and a delivery to him or to his order of that to which he had such right absolves the carrier. Dickson must look either to Trent or Mendenhall, who claims under him (*Russell* v. *Allan*, 3 *Kernan*, 173).

Again. Dickson was not the owner, for "he never had personal possession of the tobacco, or ever saw the same" (p. 15), and it was never delivered to him. To constitute a valid purchase and sale there must be a delivery by the seller, with the intent to vest the right of possession in the buyer (*Brand v. Focht*, 1 *Abb. Ct. App. Decs.* 185). Trent never had this intent, for he sold and delivered to Mendenhall. The bill of lading shows that Trent, who delivered the tobacco to the Express Company, had an intent to make, and did make his own firm and not Dickson the consignee, and he virtually made his firm consignors. The language is "Received of John F. Dickson, T. & R.," *i. e.*, *from* Trent & Rea *for* Trent & Rea.

An attempt was made in the evidence (p. 14) to prove that Trent was the agent of Dickson to deliver the tobacco to the Express Company, and, therefore, that the delivery to it was a delivery to Dickson. The attempt was a failure. The language of the bill

of exceptions is too clear for argument (*p.* 14): The plaintiff employed and paid Trent to go to Greensboro to divide the tobacco, and to ship the same *for the plaintiff* by the Southern Express Company *to West-Point, Georgia;* or to keep it till it could be so shipped; or to store it in an insurable warehouse; or, if that could not be done, to sell it and remit the proceeds."

Trent refused to perform this agency:

1. He did not "ship the same for the plaintiff to West Point, Georgia," and, therefore, he never delivered the tobacco to the Express Company for the plaintiff.

2. He did not keep it.

3. He did not store it.

4. But he did act under the fourth delegation of power, "and (p. 15) the said fifty-two boxes of tobacco were sold by said P. G. Trent to one Cyrus P. Mendenhall, at Greensboro, and were then and there delivered by the Express Company to said Mendenhall."

This sale was authorized, for the evidence failed to show that the tobacco could have been shipped for the plaintiff by express to West Point, Georgia, or that it could have been stored in an insurable warehouse; and, therefore, Trent had Dickson's authority to sell it.

Again. The place of consignment was an essential feature of the agency, and could not be changed by Trent without the assent of Dickson. There was no authority given to employ the Express Company on behalf of Dickson to effect the transportation evidenced by the bill of lading. The agency designated another place of consignment. Trent did not fulfil the agency, but adopted a new place of consignment, and, therefore, in selecting the Express Company as carrier, he was not acting on behalf of Dickson, but was acting on his own individual behalf and as principal. If he was such principal at the time of the delivery of the goods, then he had a right to coun-

termand the transportation. (*Wilson* v. *Wilson*, 26 *Penn. State*, 395.)

In *Coombs* v. *Bristol & Exeter Railway Co.*, (3 *Hurl. & Norm.* 1, 3, 5,) BRAMWELL, B., said:

"If the defendants had made the contract with Avery as principal, and Avery had afterwards said, 'I have changed my mind, keep the goods at the office till I call for them,' the plaintiff would be wrong in in suing the defendants for their non-delivery, after having allowed them to deal with Avery as principal."

There was no delivery, therefore, to Dickson, and the third exception was well taken. If there was such delivery, then Trent, under his agency, or as joint owner, had a right to sell to Mendenhall, and the first, second, fourth, and fifth exceptions were well taken.

Point XII.

Dickson acquired no rights by the delivery of the bill of lading to him in the Spring of 1865, or by his demand thereunder, in December, 1865.

1. The bill of lading was not negotiable.

2. It was not endorsed.

3. It was not transferred until after the sale to Mendenhall.

4. Dickson, if owner, could acquire no rights under it after delivery (*Dewolf* v. *Harris*, 4 *Mason*, 515; 4 *Peters*, 147).

5. Dickson's only right was to stop in transitu, and that had been lost by the sale and delivery to Mendenhall (*Walter* v. *Ross*, 2 *Wash.*, *C. C. R.*, 283).

6. Even if the bill been endorsed after the sale and delivery to Mendenhall, it would not have passed a right of action against the Express Company for an antecedent conversion or non-delivery.

The endorsement of the bill merely transfers the right of property, but gives no right of action in the contract itself; or, as PARKE B. said in *Thompson v. Dominy*, (14 *M. & W.*, 403):

"The endorsement of a bill of lading for a valuable consideration transfers the property in the goods, but I never had an idea that the contract was transferred by it * * * * By the law of England a chose in action is not transferable. By the custom of merchants it is transferable in one instance—that of a bill of exchange; but there is no authority to say that a bill of lading is transferable under such a custom, so as to enable a party to bring an action upon it * * There is no custom of merchants that, by the endorsement of a bill of of lading, a contract is transferred so as to enable the endorsee to maintain an action upon it."

So in *Saltus v. Everett*, (20 *Wendell*, 268), it was said that:

"The bill of lading is by the custom of merchants transferrable so as to vest in the consignee the title to the goods which the consignor had in them, but, beyond that, it is not negotiable."

This was reaffirmed in *Howard v. Shepherd*, (19 *Law Jour.*, *C. P.*, 249), as follows:

"The endorsee of a bill of lading cannot maintain an action on the case for non-delivery of the goods."

If the Express Company is liable at all, it is liable for breach of contract, for no other obligation is shown than such as arises from the reception of the goods, and the delivery of a bill of lading therefor; and under the bill of lading, Dickson cannot recover for *an antecedent breach*, unless aided by some such statute as the Bill of Lading Act, (18 and 19 *Vict.*, *C.* 111), as to the existence of which in the forum of this case there is no evidence. (*Short* v. *Simpson*, *Eng. Law Rep.*, 1 *C. P.*, 252.)

Finally. Nor was the demand of Dickson at Greensboro, of avail. If, as t he Court below said, the Express Company had no right to deliver to the consignees at Greensboro *a multo fortiori*, had it no right there to deliver to the consignor.

Point XIII.

The judgment should be reversed. Dickson's only legal cause of complaint is that Trent did not remit to him the proceeds of the sale to Mendenhall. This action is an ancient and fishy attempt to collect such proceeds from the Express Company who are neither legally or equitably responsible therefor.

March, 1877.

CLARENCE A. SEWARD,
CHARLES M. DA COSTA.
For Plaintiff in error.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1874.

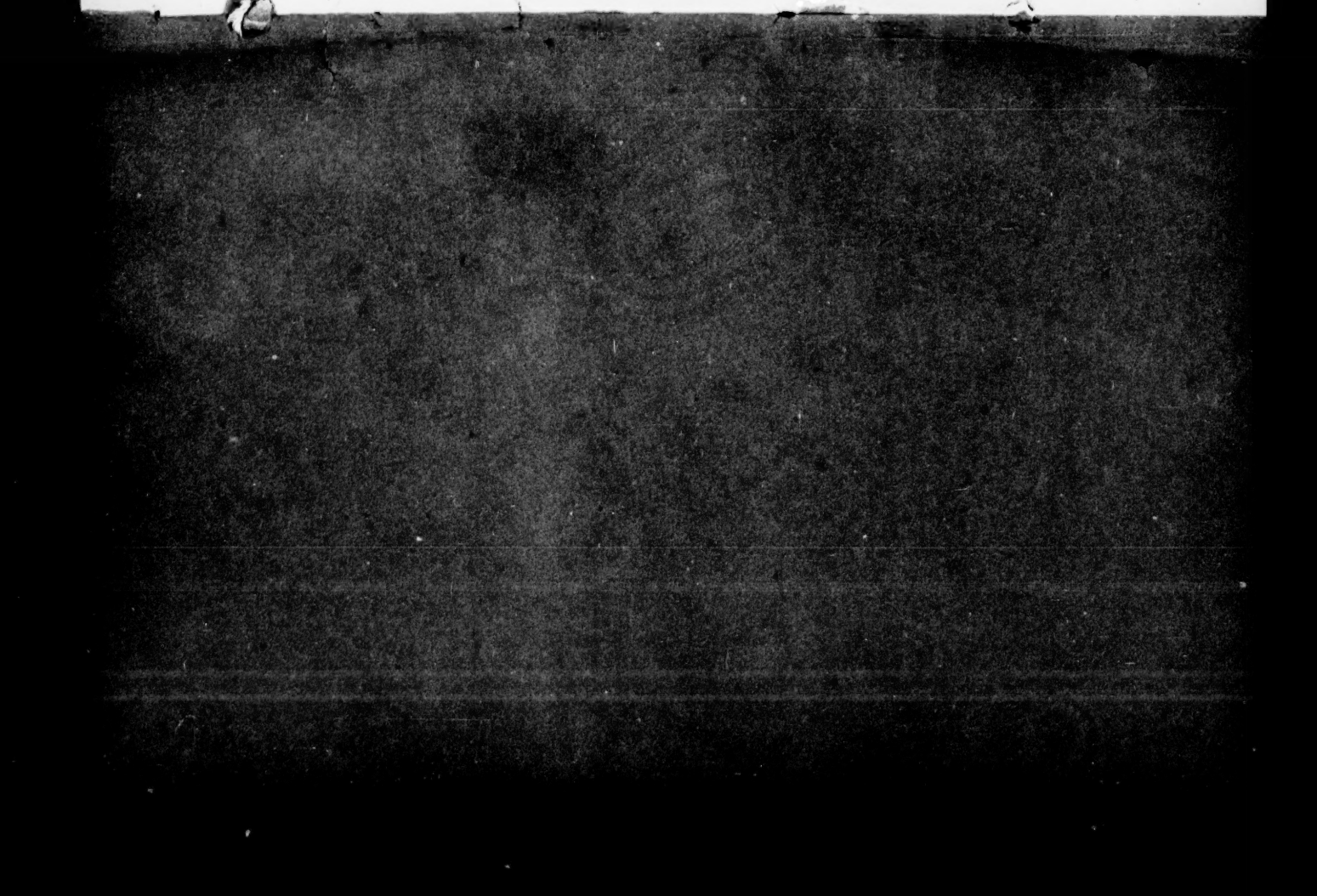
THE SOUTHERN EXPRESS COMPANY

vs.

JOHN F. DICKSON.

ROBERT H. SMITH,

ATTORNEY FOR DEFENDANT IN ERROR.



SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1874.

THE SOUTHERN EXPRESS COMPANY

vs.

JOHN F. DICKSON.

The suit was brought by Dickson to recover of the Southern Express Company the value of fifty-two boxes of Tobacco, his property, which were delivered to the Express Company on the 21st of March, 1864, as his property, and for which the company executed its bill of lading or receipt to Dickson, the effect of which was that the company undertook to deliver the tobacco to Trent & Rea, at Columbia, South Carolina.

The property was delivered to the Express Company by P. G. Trent, the agent of Dickson, and the bill of lading or receipt was taken in the name of and was afterwards delivered to Dickson. The company was informed that the tobacco was the property of the plaintiff, and it so received it.

Dickson demanded the tobacco, and the company refused to deliver. It did not pretend that it had taken it to Columbia, or had moved it from Greesboro, nor did the evidence tend to show that it had delivered it to Trent & Rea, the consignees, at any place; but knowing that it was the property of Dickson, it sought to exculpate itself from liability to him by showing that Trent, the agent to ship, (not Trent & Rea), had sold it to one Mendenhall, at Greensboro, and that the company had there delivered it, on such sale to Mendenhall, by Trent's order and direction; and it main-

tained that the delivery at Greensboro discharged its undertaking, to Dickson, the owner, to deliver it at Columbia, though the delivery was without his knowledge, consent or authority, and though Trent's agency ceased by the delivery to the company, and though the company knew that Dickson was the owner, and though Trent & Rea held no relation to the tobacco but that of consignees at Columbia, South Carolina, and though it was not pretended that they or either of them had any interest in the property except as mere consignees, who had made no advances on it and to whom Dickson owed nothing.

Defendant, below, proved that the words T. & R. Trent & Rea, Columbia, S. C." (in the bill of lading) were required by it to be put on the boxes to indicate the consignees and place at which the boxes were to be delivered, and that the persons whose names are marked are the consignees.

P. G. Trent was plaintiff's agent to deliver the tobacco to the company. Trent & Rea were the consignees at Columbia.

The instructions of Dickson to P. G. Trent were to ship the tobacco by the Southern Express Company to West Point, Georgia; or if this could not be done, then it was to be kept *by defendant* until it could be shipped, or if this could not be done, to store it there for plaintiff in an insurable warehouse; or, if this could not be done, to sell and remit the proceeds to plaintiff; but, if the delivery could be made to defendant, Trent's authority about and respecting the tobacco entirely ceased. There is nothing in the bill of exceptions to show that either of these alternative directions could not have been complied with, nor is any point made, in the bill of exceptions or charges, on the fact that the shipment was to Columbia, South Carolina. On the contrary the charges given and those asked were predicated on the concession that the shipment to Columbia was binding on plaintiff and defendant. Indeed the receipt and adoption of the bill of lading by Dickson, without dissent, shows that he adopted the act of his agent in so shipping it. And on the delivery of the tobacco to the defendant, the agency of Trent, "about and respecting the tobacco entirely ceased."

Dickson, the known owner, was the consignor named in the receipt. Trent & Rea were the consignees. And the bill of exceptions shows that the person whose name is marked on the property shipped (as shown by the receipt) is "the consignee."

and that the "other person (John F. Dickson, to whom the receipt was made) was the shipper or consignor," the words "shipper," and "consignor," being used in the bill of exceptions as convertible words to express the same person and to distinguish him from the consignee. And the bill of exceptions says the receipt is given to the shipper or consignor *in the form of the receipt given in evidence in this case;* that is to John F. Dickson, the consignor or owner. This defendant offered evidence, tending to show a custom of the company to deliver *to the consignee,* (according to the undertaking of the receipt; that *is at Columbia,* S. C.) without taking up the receipt, but taking a counter receipt from the consignee, and there was not only no delivery at Columbia, but there was no evidence of any delivery to Trent & Rea, and no counter receipt was taken, so that nothing can be found to aid defendant in this custom, even if good and binding on Dickson, the owner, without notice of its existence being traced to him; for the custom has no application to the facts of the case and cannot be to Mendenhall, a purchaser from Trent who was but one of the consignees, and whose agency for Dickson (other than as one of two consignees, as per bill of lading) had ceased over the tobacco known by the company to be Dickson's property.

But it is to be inferred from the bill of exceptions that the custom was not to deliver to the consignee (who was not owner) at any place other than the point of delivery named in the contract; for plaintiff gave evidence (in rebuttal of defendant's evidence of custom) tending to show that if the package is returned to *the shipper* (Dickson) at the place of delivery *the shipper* is required to produce and surrender the receipt, but in some cases if *the shipper* is well known to the agent of the company this is dispensed with and a *counter receipt taken.*

No counter receipt was taken.

So far then as usage relates to the case, it shows that the company violated its own usage by the delivery to *Mendenhall* in consummation of a sale to him by Trent, without authority.

The bill of exceptions states with precision the propositions respectively maintained before the Court, and to which the charges given and refused related; thus:

"The plaintiff insisted and contended that the said fifty-two boxes of tobacco had not in fact been sold or delivered to said

Mendenhall, and that if the same had been sold by said P. G. Trent to said Mendenhall and delivered to said Mendenhall by the defendant by said Trent's order or direction at Greensboro, North Carolina, such sale and delivery did not affect the rights of the plaintiff in this case. And the defendant insisted and contended that said tobacco had been in fact sold by said Trent to said Mendenhall, and delivered to said Mendenhall by the defendant, by order and direction of said Trent, and that such sale and delivery discharged the defendant from liability to plaintiff in this action.

"The charges given by the Court, as well as those asked by defendant, and refused as asked, or given with qualification by the Court, are stated by the bill of exceptions as follows:"

And the Court charged the jury that if they believed from the evidence that the said tobacco was at the time of its delivery to the defendant, the property of the plaintiff, and that was known to the defendant or its agent, though by the receipt given for it Trent & Rea were the consignees thereof, and the defendant might lawfully deliver the said tobacco to the consignees at Columbia, South Carolina, the defendant was not authorized to deliver the same to the consignees or either of them, or to any other person by the order of either of them at Greensboro, North Carolina, the place of shipment, and such delivery at Greensboro, North Carolina, without the knowledge or consent of the plaintiff would not discharge the defendant from liability therefor to the plaintiff. To which charge of the Court the defendant then and there excepted.

And the defendant then moved the Court to charge the jury as follows, to-wit:

1. That the legal effect of the receipt given by the defendant dated March 21, 1864, in evidence before the jury, taken in connection with the evidence as to usage, if such evidence is believed by the jury, was to make the tobacco therein mentioned deliverable to Trent & Rea or their order; which charge the Court refused to give as asked, but gave the same with the qualification and addition of the words "at Columbia, South Carolina, but not at Greensboro, North Carolina." To which refusal to charge as asked, and which qualification of said charge the defendant then and there severally excepted.

2. And the defendant further moved the Court to charge the jury as follows, to-wit: That if the jury believe from the evidence

that P. G. Trent, of the firm of Trent & Rea, was, at and before the time and delivery of the tobacco in controversy to the defendant, in lawful possession of said tobacco as agent of the plaintiff or otherwise, and the defendant actually received the tobacco from said P. G. Trent or Trent & Rea, and gave for it the receipt in evidence before the jury, and the jury further believe from the evidence, that the defendant afterwards redelivered the said tobacco to said P. G. Trent, or to any other person by his order and direction, in good faith, before any demand made therefor by the plaintiff, then such delivery was lawful, and the plaintiff is not entitled on account of such delivery, to recover damages therefor from the defendant in this action"—which charge the Court refused to give as asked, and to such refusal the defendant then and there excepted.

3. And the defendant further moved the Court to charge the jury as follows, to-wit:

That the receipt by an express company or other common carrier of a package or packages marked with the name of a particular person or firm name, and the name of a place within their line of transportation imposes on the carriers the duty and gives him the authority to deliver the same to such person or firm, or to his or their order, and, if no other person be named as consignee, such a delivery is a discharge of the carriers undertaking, if made to such person or firm or to some other person by his or their order or direction, at the place where the same was first received." Which charge the Court refused to give as asked, and to such refusal the defendant then and there excepted.

4. And the defendant further moved the Court to charge the jury as follows, to-wit:

That if the jury believe from the evidence that before and at the time of the delivery of the tobacco in question to the defendant, the said tobacco was in the possession of said P. G. Trent as agent of the plaintiff, and he, the said Trent, delivered the said tobacco to the defendant and took the receipt therefor given in evidence to the jury, and that the defendant afterwards, and before receiving any notice or information of the revocation of such agency, redelivered the said tobacco to said P. G. Trent, or to any other person by his order or direction, the defendant is not liable to the plaintiff in this action for any loss or damage arising from such redelivery of said tobacco to said P. G. Trent or any

other person by his order and direction," which charge the Court refused to give as asked and to such refusal the defendant then and there excepted.

SUMMARY OF POINTS PRESENTED AND AUTHORITIES.

The leading proposition is, can a consignee who has no lien or debt, and to whom an owner has consigned his property for safe keeping or sale *at a given distant point* revoke at pleasure the owner's shipment and sell the property whenever and wherever he pleases? Can a man, authorized to receive and take care of or sell anothers property at one point, arbitrarily determine, against the owner's knowledge or consent, that the owner shall not send his property to the point he may select, and if he attempts it such consignee may stop and annul the owner's act and dispose of the property when and as he pleases? The question is not whether the carrier was misled by a presumption that the consignee was the owner of the goods; for the bill of exceptions recites that the carrier KNEW that the goods BELONGED TO DICKSON; and the Court carefully left the jury to determine whether they believed that the defendant knew this fact.

Indeed, the proposition as maintained by defendant is, that one of two consignees (who was sole agent to ship, and whose power as agent had ceased) can in his own name, arbitrarily, and without qualifications revoke the shipment at pleasure and sell the property at the place of shipment, and the carrier may deliver on such sale, knowing that the shipper is the owner.

There was no evidence to show that the consignee had made any advances or had any lien on the goods. The charges asked, and the bill of exceptions, raised no question of this kind. There was evidence tending to show that the freight was prepaid when plaintiff shipped the goods; and the defendant's receipt shows that it required prepayment of freight "*in all cases*," and no point was made in reference to such prepayment.

We may admit that, as in favor of a *third party* who buys goods from a consignee on delivery of a bill of lading endorsed to him, the presumption from the bill of lading is, that the consignee is their owner; but the principal has no application to this case First, because the bill of lading was never endorsed to Mendenhall or to any one, but is still in plaintiff's possession.

That a delivery of an unendorsed bill of lading does not convey the property against the owner was expressly decided by the Supreme Court of Massachusetts in the very late case of H. C. Thatcher & Co. vs. F. E. Stollenwerck & Brothers, in manuscript, decided in June, 1874, (about June 19).

And see Abbot on shipping, part 4, ch. 4, and notes. (7 American from 8 English edition).

Ib. 330, Ib. 670.

At p. 670 Lord Tenterden says: "Nor ought the mere possession of a bill of lading, made for delivery to the consignor, and not endorsed by him, to induce any one to believe that the holder is authorized to dispose of the goods."

If Trent had endeavored to pass the title by signing Dickson's name by himself as agent, that fact alone would have put Mendenhall on inquiry as to Trent's authority to sell the goods after he had once shipped them (for an authority to ship goods does not imply the authority to withdraw them from the carrier for sale *at the place of shipment.* The test of this supposed implied authority may be put in a simple way) thus:

Is the authority to demand goods back from the carrier two or three days after the delivery to it for shipment, necessary or proper to enable the agent to perform the duty he apparently was instructed to perform, viz: to ship the goods if he could? Clearly not.

Story's agency §58, §61 to 62.

21 Law Rep., Goddard vs. The Tangier, cited in 1 Brig. Fed. Dig. p. 31, §29.

1 Sprague 358, Rich vs. Parrott, cited in 1 Brig. Fed. Dig. p. 31. §37.

Inquiry as to Trent's authority would have resulted in the ascertainment that it had entirely ceased upon delivery to the carrier.

Second—As between plaintiff and defendant, the principle of presumption of *ownership in the consignee* does not apply to the case, because defendant *knew* that the goods belonged to Dickson, the consignor, and hence that they did not belong to the consignees.

At best, if any presumption from ownership in, or right to sell by Trent could arise from the bill of lading, it was liable to be

overthrown, and was overthrown by proof that defendant *knew* the consignee was not the owner.

6 Cranch 338. Maryland Ins. Co. vs. Rudens, Admr.
6 Porter's Rep. (Ala.) 162. James vs. Sims & Scott.
8 D. & E. p. 330. Dawes vs. Peck.
3 Camp. R. p. 321. Joseph vs. Knox.
2 Camp. R. p. 639. King vs. Meredith.
6 Serg. & R. p. 429.
5 Burr p. 2680. Davis & Jordan vs. James.
1 Term. R. 659. Moore vs Nelson.
7 Mass. R. 297. Barrett *et al.* vs. Rogers.

A sale by agent or consignee, selling goods not at the place to which they were consigned, but at the place of shipment—and several days after the delivery to the carrier, not endorsing the bill of lading to the purchaser, nor even giving the carrier a written order to deliver to the purchaser, is a most unusual sale, and puts the carrier and purchaser on inquiry. The case is only made more remarkable by the fact that the carrier knew that the goods were plaintiff's, and by the fact of its failure to take any counter receipt, though by its own former custom it should have taken a receipt *even if the property had been returned to the shipper*.

1 Peters R. 444 and 445. Conard vs. Atlantic Ins. Co.

Whether the defendant regards its alleged delivery to have been made by Trent's order in his capacity as one of the consignees, or as the supposed agent of Dickson to do these things, the above answer of plaintiff is equally as complete.

A consignee who has no lien on goods, and who has not paid, and is not liable for freight, has no property or rights in them, further than a bare authority to receive them *at the place of delivery*, named and specified in the contract of shipment. When the carrier knows these facts, the bill of lading tells him and the consignee what each are to do. In it the owner has caused his wishes to be written.

The control over and right of action for the property remain in the consignor absolutely, subject only to the carriers right to deliver the goods to the consignee at the place to which he has contracted to carry them.

5 Burrows R. p. 2680. Davis & Jordan vs. James.
1 Peters R. p. 444 and 445. Conard vs. Atlantic Ins. Co.

Abbot on Shipping, top p. 425. Marginal p. 321.
6 Taunton's R. 433. Craven *et al.* vs. Ryder.
8 Cranch R. p. 418. The Frances.
1 Chitty's Pleading p. 418.
6 Cranch R. p. 338. Maryland Insurance Company vs. Rudens, Admr.
1 Term R. p. 659. Moore *et al.* vs. Wilson.
8 Term R. p. 330. Dawes vs. Reek.

The first charge which defendant asked is objectionable, among other causes apparent in other parts of this brief:

1. Because it asks the court to charge the jury on the *legal effect* of the receipt or bill of lading *taken in connection with the evidence of the usage*, ignoring all the rest of the evidence—the evidence showing that the defendant had itself not followed its own usage in this case in a singular particular. These special usages are at all times dangerous, and a sound predicate should always be laid for them. They are not admissable to make law. They are only allowed to show *how a particular business is done* —and to explain in this way what each party meant or might reasonably be supposed to have meant. It is like evidence to explain an ambiguity in a contract—to let light fall on what would otherwise be obscure. Usages must have been *uniformly observed* so that all are presumed to know them. They must be certain, so as not to be left to the mere ideas of each clerk or employee of a large corporation of what they are.

Every practitioner knows how much the most unbiased merchants will differ as to such usages in almost any given case. The defendant invokes its own special usage to apply to this case, when in this very business it did not follow its alleged usage in any respect. It neither took up its bill of lading, nor took a counter receipt against it, and has not traced any knowledge of its usage to the plaintiff. A court cannot charge on the legal effect of *one side of conflicting* evidence and ignore the other side. It is the province of juries to solve disputed facts.

The second charge asked by defendant is objectionable for many reasons.

The court is called on to charge the jury that if P. G. Trent was in lawful possession as plaintiff's agent, *or otherwise*, (in any way or character, or under any limitation whatever) when he shipped the tobacco by the defendant, and if defendant re-deliv-

from the testimony, the jury must find for defendant if they believe the facts set out in the charge.

It is hard to tell exactly what state of facts the charge does mean to submit to the jury, for the reason that they are put in the alternative in so many clauses of the charge.

Charges on assumed hypothesis of fact are construed most strongly against the party asking them. The charge must neither assume facts not in evidence, nor exclude from the jury any inference which may be drawn by it from the facts. This charge is objectionable for violating all of these rules. It would emancipate the jury from the control of the Court and evidence, and turn them loose without a guide to caprice, confused by a conflicting hypothetical state of facts, not in evidence and contrary to it.

It does not appear in the bill of exceptions that defendant was ignorant of the limit put on Trent's authority. It does appear that his authority was to cease entirely if delivery could be made to defendant, and the delivery was in fact made to defendant. Defendant knew Trent was only an agent; for it knew the goods belonged to Dickson. It was thus *prima facie* put on inquiry as to the extent of Trent's authority unless Dickson did something else to mislead defendant; and the bill of exceptions shows no such act by Dickson. *Prima facie*, it was defendant's duty to ascertain the known agent's authority and its limits, when he proposed to withdraw the goods for sale "*two or three days after* he had delivered them to defendant" for transportation.

If defendant was ignorant of the limitation on Trent's authority, or if it was misled by plaintiff's acts, its bill of exceptions ought to recite that there was some evidence tending to show its ignorance, or that it was put to sleep by plaintiff's acts. It recites no such evidence, and the appellate court in the absence of such recital cannot presume that the court below erred unless the bill of exceptions affirmatively shows that a "*manifest error* has intervened in the records and proceedings."

In a case of conflicting evidence it is not for a court to charge a jury, that one act or another on the part of a principal amounts to holding out an agent to the world as clothed with certain implied powers. It is for the jury to determine *on the whole evidence*, whether the defendant was in fact misled by such acts, and if so, whether the defendant was not at fault in disregarding facts or circumstances which ought to have put him on inquiry.

1 Black Rep. U. S. Sup. Ct. Hodge vs. Combs.
1 Peters p. 289-290. Shimmelpenich vs. Bayard.

The mere statement of the arguments, to show that defendant was put on inquiry by the unusual transaction is sufficient to show that the court could not charge the jury as a matter of law, that defendant's good faith was a justification and protection against liability.

The third charge asked by the defendant merely asserts the converse of the charge which the court gave, and we have already endeavored to show that the charge given by the court was correct.

It assumes that any one, though he be agent with limited powers to ship goods, may *under all circumstances*, and after having executed his powers by delivery to the carrier, go back at any time before the goods start on their journey and withdraw them without even giving up the bill of lading, and sell them at the place of shipment, and this even though the carrier knows that the goods do not belong to the agent. The charge asserts generally that such delivery will discharge the carrier from liability. The charge also ignores evidence given by plaintiff, as does the second charge discussed *supra*.

The fourth charge seeks to exhonerate defendant on the supposition that it re-delivered the goods on Trent's order, before notice of the revocation of his agency.

There was never any *revocation* of Trent's agency. It is not a question of *revocation* at all. If Trent did sell the goods to Mendenhall, he exceeded his authority, and did it after his authority had entirely ceased. It is simply a question:

First, Does bare authority to ship goods by a carrier imply the authority to withdraw them for sale?

Second, We deny that a bare act of appointing an agent to ship a single lot of goods implies the authority to withdraw them and to sell them, but conceding it for a moment for argument, how could the Court charge the jury that a redelivery by defendant would justify it when it knew that the goods did not belong to the agent, and when there was evidence tending to show facts to put the defendant on inquiry as to the expiration of the agent's authority, and when the bill of exceptions does not set forth that there was any evidence tending to show that defendant was ignorant of the limit put on the agent's authority. This

Supreme Court of the United States.

OCTOBER TERM, 1876. No. 247.

THE SOUTHERN EXPRESS COMPANY,
Plaintiff in Error,

against

JOHN F. DICKSON.
Defendant in Error.

From the Circuit Court of the United States for the Southern District of Alabama.

CONWAY ROBINSON,
for Defendants in Error.

April 16, 1876.

R. O. POLKINHORN, Printer, 632 D St., N. W.

Supreme Court of United States.

OCTOBER TERM, 1876. No. 247.

THE SOUTHERN EXPRESS COMPANY,
Plaintiff in Error,

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Defendant in Error.

From the Circuit Court of the United States for the Southern District of Alabama.

Statement of the Case.

The action was for the failure of the Southern Express Company to keep safely and make proper delivery of certain goods, to wit, fifty-two boxes of tobacco received from Dickson by said company as common carriers.

According to the bill of exceptions, (p. 14,) the plaintiff gave evidence tending to show that in January, 1864, he purchased from one Rea, in Chambers county, Alabama, where the plaintiff then resided, 150 boxes of tobacco, all of which he, the plaintiff, afterwards received, except the 52 boxes of tobacco which are the subject of this suit; that at the time of such purchase said Rea and one P. G. Kent, both of whom resided in Chambers county, Alabama, were partners in the business of deal-

ing in tobacco, under the firm name of Trent & Rea; that the tobacco so purchased was part of a large lot of tobacco belonging to said Trent & Rea, and the 52 boxes of tobacco now in question were part of a larger quantity which said Trent & Rea had purchased, to be delivered to them, and which was afterwards delivered to them at Greensboro, North Carolina, and such purchase of Rea's interest therein by plaintiff was made with the knowledge and consent of said P. G. Trent; and that afterwards—in the early part of March, 1864—in Chambers county, Alabama, the plaintiff employed and paid said P. G. Trent to go on to Greensboro, North Carolina, to divide the tobacco of Trent & Rea there, and set apart for the plaintiff 52 boxes of said tobacco, and to ship the same for the plaintiff, by the Southern Express Company, to West Point, Georgia, or, if it could not then be so shipped, to be kept by the defendant until it could be shipped, or, if that could not be done, to store it there for the plaintiff in an insurable warehouse, or, if that could not be done, to sell the same, and remit the proceeds to the plaintiff; but that *if the delivery could be made to the defendant, the said Trent's authority about and respecting the tobacco* entirely *ceased;* and that the said P. G. Trent did accordingly go on to Greensboro, and there, in March, 1865, divided the larger lot of tobacco belon g ing to Trent & Rea, and did then set apart the 52 boxes of tobacco—part of such larger quantity—for the plaintiff; and the whole of said larger lot of tobacco being then and previously in the express office of the defendant, that the said P. G. Trent, to wit, on the 21st of March, 1864, informed R. M. Sloan, the agent of the defendant there, of such division, and took from him the receipt for said 52 boxes of tobacco, and *informed said Sloan that said 52 boxes of tobacco belonged to the plaintiff.*

The receipt (pp. 17, 18) given in evidence, and referred

to in the bill of exceptions, is signed "For the company. R. M. Sloan." It begins thus:

"SOUTHERN EXPRESS COMPANY,
GREENSBORO, N. C., *March* 21, 1864.

"Received of John F. Dickson, T. & R., fifty-two boxes, valued at each $200, and for which amount the charges are made by said company, marked 'T. & R.—Trent & Rea, Columbia, S. C.—war risk excepted,' which it is mutually agreed to be forwarded to our agency nearest or most convenient to destination, and there delivered to other parties to complete the transportation. It is further agreed, and is a part of the consideration of this contract, that the Southern Express Company is not to be held liable or responsible for the property herein mentioned for any loss or damage arising from the dangers of railroad, ocean, steam, or river navigation, leakage, fire, or from any cause whatever; except the same be proved to have occurred through the fraud or gross negligence of its agents or servants, unless specifically insured by it, and so specified in this receipt."

The bill of exceptions further states (pp. 14, 15) as follows:

"That afterwards—*in the spring of the year* 1865—*the said P. G. Trent gave to the plaintiff the said receipt*, and that afterwards—in December, 1865—*the plaintiff*, at Greensboro, North Carolina, *produced the same receipt to the said agent of the defendant, and demanded the said tobacco* of said agent, who would not deliver the same to the plaintiff. And the plaintiff further gave evidence tending to show that the said tobacco was never delivered to him, or to any one for him or by his order. There was *no evidence on either side tending to show that there was any delivery of the tobacco at Columbia*, South Carolina, the place to which it was consigned. The defendant gave evidence to the jury tending to shew that the plaintiff himself had never had personal possession of said fifty-two boxes of tobacco, nor ever saw the same, and that the same was in fact delivered to defendant by said P. G. Trent, who was known to the agent of defendant, and the receipt for the same in the form in which it now is was then made and delivered to said P. G. Trent, and that said fifty-two boxes of tobacco were sold a few days after the giving of said receipt by said P. G. Trent to one Cyrus P. Mendenhall, at Greensboro, North Carolina, and was then and there delivered to said Mendenhall by the said agent of the defendant, by the order and direction of the said P. G. Trent; and the freight for the transportation and carriage of said tobacco had not been paid or tendered to the defendant before such sale and delivery to said Mendenhall;

but as to said matters there was conflicting evidence. In another place (pp. 15, 16) it is stated: 'There was conflicting evidence as to the alleged tender of freight on said tobacco to the defendant, and as to the value of the tobacco, and as to the alleged sale and delivery of said tobacco to said Mendenhall.'

"There was no evidence tending to shew that the sale and delivery to Mendenhall was known to or assented to by plaintiff. On p. 16 it is stated that 'the plaintiff insisted and contended that the said fifty-two boxes of tobacco had not in fact been sold or delivered to said Mendenhall, and that if the same had been sold by said P. G. Trent to said Mendenhall by the defendant, by said Trent's order or direction, at Greensboro, North Carolina, such sale and delivery did not affect the rights of the plaintiff.'

"The defendant gave evidence tending to show that, by the usage and custom in the express business, persons delivering packages to the express company for carriage are required to mark on such package the name of the person or persons to whom they are to be delivered, and of the place at which they are to be delivered; and the person or persons whose name is so marked is deemed the consignee of such package, and a receipt therefor is given to the shipper or consignor in the form of the receipt given in evidence in this case, and that the package is delivered to the consignee without requiring him to produce any receipt of the company therefor, the company taking a receipt of the consignee for the package when delivered. "The plaintiff gave evidence, in rebuttal, tending to show that *if the package is returned to the shipper at the place of shipment, the usual custom is to require the shipper to produce and surrender the receipt* given him therefor; but *this is sometimes not required when the shipper is well known* to the agent of the company, *but in such case a counter receipt is taken* for the goods. *There was no evidence that any counter receipt was taken for the goods.*

"The Court charged the jury (p. 16) that if they believed from the evidence that said tobacco was, at the time of its delivery to the defendant, the property of the plaintiff, and that was known to the defendant or its agent, though by the receipt given for it Trent & Rea were the consignees thereof, and the defendant might lawfully deliver the said tobacco to the consignees at Columbia, South Carolina, the defendant was not authorized to deliver the same to the consignees or either of them, or to any other person, by the order of either of them, at Greensboro, North Carolina, the place of shipment; and such delivery at Greensboro, North Carolina, without the knowledge or consent of the plaintiff, would not discharge the defendant from liability therefor to the plaintiff."

To which charge of the court the defendant excepted.

Brief of the Argument.

1. Supposing there was either a breach of contract or a breach of duty, it is enough that one or the other was shewn at the trial. It matters not whether the liability was at common law, as carriers, or in respect of a special contract. As *Parke* B. said in 1841, "under this declaration, the plaintiff might recover for any species of loss by neglect; and, according to the decision of the Court of Queen's Bench in the case of *Pozzi* vs. *Shipton*, (8 Adol. & El., 973; 1 Per. & Dav., 4,) for any species of loss for which a common carrier would be responsible." *Wyld* vs. *Pickford*, 8 M. & W., 459.

No objection was made at the trial because of the nature of the allegations or because of variance between the allegations and proofs; nor was there ground for such objection. *Clarke* vs. *Gray*, *&c.*, 6 East., 569, (cited in 4 Rob. Pract., tit. 3, pp. 235, 236.) The plaintiff had a right to shew, under the last count, (p. 12,) a breach of the undertaking, therein alleged, to keep the tobacco safely until the same could be safely transported to Columbia; or to shew a breach of the undertaking, as stated on p. 10, according to its legal effect. *Dexter* vs. *Manley*, 4 Cush., 24, (cited in 3 Rob. Pract., ch. 94, § 4, pp. 548, 549.)

The receipt (pp. 17, 18) does not prevent the plaintiff from proving the truth of the case. *Hibbert* vs. *Carter*, 1 T. R., 747, 748, and note; *Maryland Ins. Co.* vs. *Ruden's Adm'r*, 6 Cranch, 340; *Barrett*, *&c.*, vs. *Rogers*, 7 Mass., 297. A bill of lading, or the indorsement thereof, can always be explained by parol. The same may be shewn by parol to have been intended as evidence of an absolute sale, a trust or mortgage, a pledge, a lien, or a mere agency. *Grosvenor* vs. *Phillips*, 2 Hill, 152; *Bank of Rochester* vs. *Jones*, 4 Comstock, 501. *The court* "*may*

with propriety take into consideration the facts as stated in this case, in connection with the bill of lading, as competent evidence, not for the purpose of proving a parol agreement different from that expressed in writing, or that the parties meant and intended somewhat different, but *to prove the relations in which they stood and the circumstances by which they were surrounded, in order to give effect to the terms of the instrument.*" *Blanchard, &c.*, vs. *Page, &c.*, 8 Gray, 288.

In 11 Geo. 3 (1770) the action for not delivering goods sent by the plaintiffs was properly brought in their names, they being the persons who agreed with the carrier, and were to pay him. *Davis & Jordan* vs. *James*, 5 Burr, 2680. In 27 Geo. 3 it was no valid objection that, by the contract between the plaintiffs and their consignee, he had agreed with them to pay the carriage. *Moore, &c.*, vs. *Wilson*, 1 T. R., 659. The legal rights depend upon the contract. Whoever has sustained the loss is the proper party to call for compensation from the person by whom he has been injured. Ld. *Kenyon*, C. J., in *Dawes* vs. *Peck*, 8 T. R., 332.

In Alabama it was observed in 1837 that "in a majority of instances where country produce is shipped from the up country to market, the shipment is made on the account and risk of the shipper; that the consignee is merely his factor or agent, with instructions either to resell or reship." *Jones, &c.*, vs. *Sims, &c.*, 6 Porter, 163.

Here privity of contract is established between the plaintiffs and the defendants. *Joseph, &c.*, vs. *Knox*, 3 Camp., 321. The legal right was in the plaintiff, and the plaintiff's agent employed the carriers. *Parke*, J., in *Freeman* vs. *Birch*, 1 Nev. & Man., 420. The delivery of the tobacco was to them as agents of the plaintiff. *The Frances*, 8 Cranch, 420. The contract appears by the terms of the receipt (pp. 17, 18) to have been made with

him; and upon the evidence in the cause it was made on his account; it was made at his risk and for his benefit, and not at the risk or for the benefit of Trent & Rea, or of Trent alone. *Sargent* vs. *Morris*, 3 Barn. & All., 277. The plaintiff never parted with the control over the goods. *Craven*, *&c.*, vs. *Ryder*, 6 Taunt., 433, 1 Eng. C. L. In such a case, "an action for damage to the goods, or non-delivery thereof, on the contract, must regularly be brought by the" present plaintiff. *Blanchard*, *&c.*, vs. *Page*, *&c.*, 8 Gray, 293.

"It has been decided that where a receipt is given for goods put on board a ship it behooves the master not to sign a bill of lading till that receipt is given up." *Abbott*, C. J., in 1826, after so stating, says: "It is highly convenient that the law should be so; if it were not so, it would be in the power of the master of the ship to elect which party should have the goods. He adds that "in one case it was held that the circumstance of the seller's name being omitted in the receipt made no difference." *Thompson*, *&c.*, vs. *Trail*, *&c.*, 2 C. & P., 334; 12 Eng., C. L. Here the plaintiff's name is not omitted in the receipt. He was not only the shipper of goods owned by himself, but he was the holder of the receipt. After that receipt was taken it was, according to *Craven*, *&c.*, vs. *Ryder*, 2 Marsh., 127, 6 Taunt., 433, and *Ruck* vs. *Hatfield*, 5 Barn. & Ald., 632, in his, the plaintiff's, power to direct to whom the goods should be delivered. *Jones* vs. *Bradner*, 14 Barbour, 200, 201; Abb. on Ship., p. 279 of 11 Lond. ed.; *Blanchard*, *&c.*, vs. *Page*, *&c.*, 8 Gray, 285. But the power which was in the plaintiff to pass title to the property was not in another. *Conard* vs. *Atlantic Ins. Co.*, 1 Peters, 445.

As against the plaintiff, there can be no valid defense arising out of a delivery at a place different from that

which the plaintiff had authorized. The carriers were bound to deliver the tobacco safely at the place to which it was directed—at Columbia, or an "agency nearest or most convenient to destination." *Ellis* vs. *Turner*, *&c.*, 8 T. R., 530; *Wood*, B., in *Bodenham*, *&c.*, vs. *Bennett*, *&c.*, 4 Price, 35; *Dallas*, C. J., in *Duff* vs. *Budd*, 3 Brod. and Bingh., 182. The plaintiff is not bound by what Trent did as to a change in the place of delivery. Trent was not authorized to dispose of the tobacco after he, as the plaintiff's agent, had for him shipped it and taken a receipt in the plaintiff's name. *Newsom*, *&c.*, vs. *Thornton*, *&c.*, 6 East., 17; and the defendants were not authorized to deliver the tobacco to Mendenhall. Good faith forbade such disposition and such delivery. *Buller*, J., in *Solomons* vs. *Nesson*, 2 T. R., 681; *Cuming* vs. *Brown*, 9 East., 515. In 1822 *Richardson*, J., considered "there was clearly a property in the plaintiffs, entitling them to sue, as they had been imposed on by a gross fraud," and there was "gross negligence on the part of the carrier." *Duff* vs. *Budd*, 3 Brod. & Bough., 184, recognized in 1828 by Sir *James Allan Park* in *Stephenson* vs. *Hart*, 4 Bingh., 484, 485.

An agent with limited power cannot bind his principal where he transcends his power; a person transacting business with him as such agent is bound to know the extent of his authority. Here the principal has not, by his declaration or conduct, authorized the opinion that he had given more extensive powers to his agent than were in fact given. The defendants cannot allege that they have been deceived by the principal. If they placed too much confidence in the agent, the responsibility and the loss are their own. *Schemmelpenick*, *&c.*, vs. *Bayard*, *&c.*, 1 Peters, 290, 291; *Mussey* vs. *Beecher*, 3 Cush., 517. They knew (through Sloan, their agent,) that the plaintiff was the owner of the goods, and the consignees were

merely his factors. *Conard* vs. *Atlantic Ins, Co.*, 1 Peters, 445. And they "were bound to deliver to the right person." *Angle & Co.* vs. *Mississippi & M. R. Co.*, 9 Iowa, 501. The present case is very different from that in Maine in 1858, where, according to "the facts agreed upon by the parties," the transaction was "in good faith in the usual course of business." *Lee* vs. *Kimball*, 45 Maine, 194. Here the defendants shew no facts sufficient to constitute a valid defence. *Hodge* vs. *Combs*, 1 Black, 192; *Bostwick* vs. *Balt. & Ohio R. R. Co.*, 45 N. Y., 716.

In 1826, tin received from the plaintiffs was at London on a ship for Leghorn; their clerk, producing the receipt, demanded that the box should be delivered back, which the captain refused, saying that he had signed a bill of lading to M. A. & Co. The action being trover, and it being objected that there was no conversion, it was argued that no tender was made either of the amount of the freight or of any compensation for the trouble, and the plaintiffs had no right to have the goods delivered up. This argument was met by *Abbott*, C. J., thus: "If the captain says 'I won't deliver the goods to you, but will deliver them to A. B. or C., that is a conversion.'" *Thompson, &c.*, v. *Trail, &c.*, 2 C. & P., 339, 12 Eng. C. L.

In 1831, in an action against ship-owners on a bill of lading, by the terms of which there was an undertaking to deliver certain goods at London to the plaintiff's orders, the complaint being that instead of so delivering them, "the defendants delivered them at another place, and to a person who had not the plaintiff's orders," Lord *Tenterden*, C. J., said: "This was a breach of the contract for which the plaintiffs might undoubtedly maintain an action against the ship-owners." *Brandt* v. *Bowlby*, 2 Barn. & Adol., 936. The defendant having delivered to a third party, *Parke*, J., said: "In order to de-

fend themselves they must establish the right of that third party but in that they have failed." S. C., 938; cited in Abb. on Ship., pp. 284, 285, of 11th ed.

Ld. *Dennison*, C. J., (in 1840,) speaking of the nature and operation of a bill of lading, said: "As between the owner and the shipper of the goods and the captain, it fixes and determines the duty of the latter as to the person to whom it is (*at* the time) the pleasure of the former that the goods should be delivered. But there is nothing final or irrevocable in its nature. The owner of the goods may change his purpose, or at any rate before the delivery of the goods themselves or of the bill of lading to the party named in it and may order the delivery to be to some other person, to B instead of A." *Mitchel* v. *Ede*, 11 Adol. & El., 903. Ld. *Tenterden's* observation upon this case is pertinent to the present. He says: "In *Mitchell* v. *Ede*, there was no evidence of an intention that the property in the goods should, in any event, vest in the defendant. Had the bill of lading remained unaltered, he would have received the goods in the same character as he effected the insurance of them, and that would rather appear to have been *the character of an agent for the consignor*." Abb. on Ship., p. 287 of 11 Lond. ed.

In 1843 the court of exchequer were of opinion that "the circumstance of the shippers making the linseed deliverable to order by the bill of lading, clearly" showed their intention to preserve the right of property and possession in themselves, until they had made an assignment of the bill of lading to some other person, and that "though the goods might have been purchased with an intention that they should be delivered to E, that intention was never executed." *Ellershaw* v. *Magniac*, 6 W. H. & G. (Excheq.) 569,572 *note*.

So in 1848 the fact of making the bill of lading deliv-

erable to the order of the consignee was held decisive to shew that no property passed to the consignee; it being clearly intended by the consignor to preserve his title to the goods until he did a further act. *Wait* v. *Baker*, 2 W. H. &. G. (Excheq.) 7; *Parke*, B., in *Van Casteel* v. *Booker*, Id. 708. With these cases the Queen's Bench agreed in 1849 in *Jonkyns* v. *Brown*, 14 Adol. & El., N. S. 503.

The cases of *Bohtlinck*, *&c.*, v. *Inglis*, *&c.*, 3 East, 381, (and the case of *Fowler*, *&c.*, v. *McTaggart & Co.*, there cited), *Coae*, *&c.*, v. *Harden*, *&c.*, 4 Id., 211, *The Constantia*, 6 Rob. Adm. R., 329, and *Ogle* v. *Atkinson*, *&c.*, 5 Taunt., 759, 1 Marsh., 323, were all of them reviewed in 1851 in the Exchequer Chamber, and not only were they distinguished from, but *Wait* v. *Baker* and *Van Casteel* v. *Booker* were followed in, the case then before the court, wherein the vendors by the terms of the bill of lading made the cotton deliverable at Liverpool to their order or assigns; and there was not, therefore, a delivery of the cotton to the purchasers as owners." *Turner* v. *Trustees*, 6 W. H. & G. (Excheq.) 564.

In the Queen's Bench in 1854, Ld. *Campbell*, C. J., said: "Although the shipper may have endorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him, or transferred without his authority, a subsequent *bona fide* transferree for value, cannot make title under it, as against the shipper of the goods." *Gurney* v. *Behrend*, 3 El. & Bl., 634.

In the same court in 1857, Ld. *Campbell*, C. J. said "Coles Brothers, knew full well, that until they redeemed the mate's receipt, they had no right of property in the spelter, and no right to obtain a bill of lading for it. They were well aware that in obtaining a bill of lading without the mate's receipt, they committed a gross fraud.

They thereby acquired the power of giving *a right as against the shipowner or charterer*, to a bona fide assignee of the bill of lading for value; but they acquired *no right as against the defendant* in whom the property was still vested." *Schuster* v. *McKellar*, 7 El. & Bl., 721. In the present case the defendants have not fulfilled their contract by the wrongful delivery of the goods to a third person. *Sheridan* v. *New Quay Co.*, 4 Com., B. (J. Scott) N. S., 618, 93 Eng. C. L.; *Short* v. *Simpson*, L. R., 1 C. P., 255. As *Cockburn*, C. J. said (in 1869): "The consignor should not be prejudiced by having the bill of lading operate to transfer the property for which he has not got any consideration or equivalent." *Shepherd* v. *Harrison*, L. R. 4, Q. B. 205; S. C. L. R. 5 App. Cas., 119. In Massachusetts in 1874, *Gray*, C. J. said: "So long as the bill of lading remains in the hands of the original party, or of an agent entrusted with it for a special purpose, and not authorized to sell or pledge the goods, a person who gets possession of it without the authority of the owner, although with the assent of the agent, acquires no title as against the principal." *Stollenwerck* v. *Thacher*, 115 Mass., 227.

It follows that the Circuit Court did not err in its charge to the jury (p. 16.)

II. That the Circuit Court did not err in overruling the defendant's four motions to charge the jury (pp. 16, 17), is manifest from the authorities cited in support of the charge which the court did give.

CONWAY ROBINSON,
for Defendants in Error.

April 16, 1876.